No. 82-6019

82-6019

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CL w/ 82-1095

ROBERT ALTON HARRIS,

Cross-Petitioner,

v.

R. PULLEY, Warden of the
California State Prison at
San Quentin,

Cross-Respondent,

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW [1]

Whether California's death-penalty statute, as applied to sentence petitioner to death, violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

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1. Pursuant to Rule 20.5, petitioner seeks the grant of the instant cross-petition only in the event the Court should grant the petition for a writ of certiorari filed on December 28, 1982 by Warden Pulley.

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CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The cross-petitioner, ROBERT ALTON HARRIS, respectfully requests, in the event this Court grants the petition for a writ of certiorari filed on December 28, 1982 by Warden Pulley that this cross-petition be granted to review the September 16, 1982 decision of the Court of Appeal (Appendix A).[2/] Petitions for rehearing in the court below were denied on November 15, 1982, and minor modifications were made in the majority opinion (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) and Rules 19.5 and 20.5 of the Rules of this Court.

2. Cross-petitioner's references to the opinion of the Court of Appeal (as Appendix A) and the modification of the opinion (Appendix B) are to the Appendices already filed by Warden Pulley.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides in part:

> ". . .nor [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment provides in part:

> "No State shall. . .deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROCEEDINGS BELOW

Cross-petitioner, ROBERT ALTON HARRIS, after the affirmance of his judgment of death by the California Supreme Court (People v. Harris (1981) 28 Cal.3d 935), filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California. The district court dismissed cross-petitioner's claims without reviewing the state court record or holding an evidentiary hearing. The Ninth Circuit vacated the dismissal order and remanded the matter for reconsideration of cross-petitioner's claims of prejudicial pre-trial publicity (Appendix A, 37-8), discriminatory infliction of the death penalty based on race of the victim and sex of the offender (id. at 29-32), and to permit the California Supreme Court "to determine if the death penalty in this case is proportionate to other sentences imposed for similar crimes" (id. at 22).

ARGUMENT

CROSS-PETITIONER HARRIS' SENTENCE OF DEATH IS INDISTINGUISHABLE FROM WILLIAM HENRY FURMAN'S (FURMAN v. GEORGIA (1972) 408 U.S. 238) BECAUSE THE CALIFORNIA DEATH PENALTY STATUTE UNDER WHICH HIS JURY WAS INSTRUCTED PERMITS UNFETTERED, UNREVIEWABLE JURY DISCRETION IN SELECTING WHICH DEFENDANTS MUST DIE, AND AS SUCH IS UNCONSTITUTIONAL FOR FAILING TO GUIDE JURY DISCRETION TO PRODUCE RATIONAL AND CONSISTENT DEATH SENTENCES.

A majority of the Court of Appeals rejected cross-petitioner Harris' contentions that the California death-penalty statute, as applied to sentence him to death, violated the Eighth and Fourteenth Amendments. The California statute, "examined on an individual basis" as required by Gregg v. Georgia (1976) 428 U.S. 153, 195, exhibits numerous constitutional deficiencies which were raised by cross-petitioner in the proceedings below and have been catalogued in Judge Canby's concurring opinion (App.A, 61-66) and in the separate dissenting opinions of Chief Justice Bird and Justice Mosk in People v. Jackson (1981) 28 Cal.3d 339-365 (Bird, C.J.), 336-339 (Mosk, J.).[3/] These deficiencies include the lack of clear and objective standards which the state "deems particularly relevant to the sentencing decision" (Gregg v. Georgia, supra, at 192); the lack of restrictions on the sentencing authority's use of non-statutory aggravating factors in making a sentencing decision (People v. Murtishaw (1980) 29 Cal.3d 733, 773); the lack of any burden or standard of proof to govern the fact-finding or penalty decision by the sentencing authority (Cf. Santosky v. Kramer (1982) ____ U.S. ____, 71 L.Ed.2d 599; Bullington v. Missouri (1981) 451 U.S. 430); and the absence of written findings of those factors relied upon by the sentencing authority in imposing a death sentence (see Judge Canby's concurring opinion, supra, finding the California statute unconstitutional for this reason alone).

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3. Justice Tobriner joined the dissents of both the Chief Justice and Justice Mosk.

The Court of Appeals majority's rejection of cross-petitioner's challenge to the California statute on the grounds set forth above would not ordinarily warrant review by certiorari at this time, because it is dictum. Nor do the issues raised by the Warden's petition for certiorari warrant review by this Court, inasmuch as the decision below does nothing more than require the California Supreme Court to give cross-petitioner Harris the kind of appellate review of his death sentence which the California Supreme Court said in People v. Frierson (1979) 125 Cal.3d 142, 180-184 that it would give to all California death sentences, but which it did not provide in cross-petitioner's case. Such a remand to the California Supreme Court to "remove any legitimate basis for finding ambiguity" concerning the scope and nature of appellate review afforded by the California Supreme Court is manifestly appropriate, Eddings v. Oklahoma (1982) ___ U.S. ___, 71 L.Ed.2d 1, 14 (O'Connor, J., concurring). Until the California Supreme Court has reconsidered the matter so as to resolve this ambiguity, the case presents no significant issue of federal constitutional law requiring decision. 4/

However, should the State's petition for certiorari be granted, it would be manifestly appropriate for the Court to grant this cross-petition in order to consider Harris' challenges to the California statute as well. This is so, first, because the question of the scope of constitutionally required appellate review of death sentences under the California statutory scheme cannot properly be considered in isolation from other

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4. Before this Court considers the issue of whether California's death statute requires some form of case-comparison review, it should first have the benefit of the California Supreme Court's views on the question. The issue is currently before that Court in In re Jackson, Crim. No. 22165. (See concurring opinion of Justice Kaus in People v. Easley (12/10/82) ___ Cal.3d ___, p.8, noting that the issue of proportionality review is "unsettled" in that Court and is pending in Jackson.)

features of California's death-sentencing procedure which constitute the gravamen of cross-petitioner Harris' challenges to it; and, second, because if the decision of the Court of Appeals below is to be reopened, the majority's rejection of cross-petitioner's challenges to the California statute lose their character as dictum and may become decisive of cross-petitioner's life or death. If so, they should be authoritatively reviewed by this Court.

CONCLUSION

WHEREFORE, if the State's petition for certiorari is granted, cross-petitioner Harris prays that this cross-petition also be granted.

DATED: Jan. 6, 1983

Respectfully submitted,

Charles M. Sevilla

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Cross-Respondent,

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED ON CROSS-PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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Cross-Petitioner,

v.

R. PULLEY, Warden of the
California State Prison at
San Quentin,

Cross-Respondent.

MOTION FOR LEAVE TO PROCEED ON CROSS-PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, the cross-petitioner, Robert Alton Harris, asks leave to file the attached cross-petition for Writ of Certiorari to the Supreme Court of the United States, without prepayment of fees or costs and to proceed in forma pauperis.

Cross-petitioner has been indigent at all times during the proceedings against him. In both the state courts as well as in the federal courts below he has had counsel appointed to represent him, and if his cross-petition for writ of certiorari is granted, he respectfully requests that the Court appoint counsel to represent him.

DATED: Jan. 6, 1983

Respectfully submitted,

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SUPREME COURT
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PEOPLE v. HARRIS

Crim. 20888

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C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	Crim. 20888
	)	
ROBERT ALTON HARRIS,	)	Super. Ct. No. 44135
	)	
Defendant and Appellant.	)	
	)	
	)	

Defendant Robert Alton Harris appeals from a judgment imposing the death penalty following his conviction of kidnaping, robbery and first degree murder of John Mayeski and Michael Baker. (Pen. Code, §§ 187, 189, 190, 209, subd. (b), 211.)[1/] Defendant was also convicted of receiving stolen property (§ 496, subd. 1) and of possession of a concealable firearm by an ex-felon (§ 12021). The latter offense and the allegation that he had served a prior separate prison term for manslaughter, a "violent felony" within the meaning of section 667.5, subdivision (c), were admitted by defendant outside the presence of the jury. With regard to each of the kidnaping, robbery and murder

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1/ Statutory references are to sections of the Penal Code unless otherwise noted.

(SEE CONCURRING AND DISSENTING OPINIONS)

counts, the jury found defendant was armed with a firearm (§ 12022), personally used a firearm (§§ 1203.06, 12022.5) and personally inflicted great bodily injury upon his victims (§ 12022.7). That defendant was convicted in this proceeding of more than one first degree murder was one of the special circumstances found by the jury. (§ 190.2, subd. (c)(5).) The other special circumstances were that each of the murders was willful, deliberate, premeditated and committed during the commission of kidnaping and robbery. (§ 190.2, subd. (c)(3)(i)-(iii).) We affirm the judgment.

GUILT PHASE

In May or June of 1978 defendant first asked his brother Daniel for help in a planned bank robbery.[2/] Defendant next raised the subject in July of 1978 while visiting Daniel in Visalia. On 2 July 1978, Daniel stole a .22 rifle and a .9 millimeter pistol from the home of Jim Corbin, a neighbor. While Daniel and defendant were in the house, apparently in Corbin's absence, defendant stated they needed weapons for the bank robbery and asked whether there were any in the house. Daniel then showed defendant the guns and took them from the house.

2/ Daniel testified for the People in return for being permitted to plead guilty to one count of kidnaping. His testimony was corroborated by a series of extrajudicial statements made by defendant.

The brothers left Visalia for San Diego that evening. The next morning, 3 July 1978, they purchased ammunition, went to a nearby rural area and practiced firing the weapons by shooting at trees while running and rolling--a drill they considered appropriate in preparing for the bank robbery. The brothers then drove to the Mira Mesa area of San Diego County and spent the night in a house defendant had been sharing with his girl friend.

The following morning, 4 July 1978, defendant and his brother purchased more ammunition as well as knit caps, in which they burned eye holes, to serve as masks in the bank robbery. That afternoon they went to the Miramar Lake area, near Mira Mesa, for more shooting practice. They walked up a fire trail, fired a few rounds, but left when a vehicle approached. They next reconnoitered the area around their intended target--the San Diego Trust and Savings Bank on Mira Mesa Boulevard.

The next morning, 5 July 1978, having decided to steal an automobile for use as a getaway car, the brothers spotted a green Ford in a grocery store parking lot directly across Mira Mesa Boulevard from the bank. John Mayeski, 15, and Michael Baker, 16, were in the car eating hamburgers. Assuring Daniel "nobody is going to get hurt," defendant walked over to the Ford, pulled the pistol from his waistband,

and got in the back seat. With Daniel following in defendant's car, the Ford was then driven out Mira Mesa Boulevard toward Miramar Lake and the fire trail where the brothers had been the day before.

At the foot of the fire trail defendant and Daniel parked the cars and forced the two boys to walk up the trail at gunpoint. Defendant was carrying the pistol and Daniel the rifle. Defendant told the boys their car was going to be used in a bank robbery but that no one would be hurt. Defendant asked the boys whether there was any rope in their car. The boys replied there was not but said they would walk to the top of the hill, wait until the brothers drove back to Mira Mesa, and then report the Ford as stolen, giving the police a misleading description of the thieves. Defendant voiced approval of this suggestion.

The boys then began walking up the hill. Suddenly, Daniel heard a shot. Turning around, he saw John Mayeski fall to the ground. Defendant had shot the boy in the back with the pistol. Defendant fired another shot into the boy's head, then ran after Michael Baker. Finding the Baker boy crouching and screaming in the brush, defendant shot him four times. Defendant then went back to the fallen Mayeski boy and fired a shot point-blank into his head. Finally, defendant picked up the rifle dropped by

Daniel and shot John Mayeski yet again. The brothers then left the murder scene and drove back to the house defendant shared in Mira Mesa. There defendant ate the remainder of the dead boys' food and laughed at Daniel for not having the stomach to join him.

While the brothers continued preparing for the bank robbery, defendant laughed and giggled about shooting the boys, saying he had blown Michael Baker's arm off. Defendant also amused himself by imagining what it would be like to be a police officer and to report the boys' deaths to their families. When Daniel noted there were fragments of flesh on defendant's pistol, apparently from the point-blank shot fired into John Mayeski's head, defendant laughed, commented he had really blown the boy's brains out, and then flicked the bits of flesh into the street.

Later the same day the brothers robbed the bank.[3/] They were quickly arrested for the bank robbery when a witness, who followed them from the bank to defendant's house, called the police.

3/ They were convicted of this crime in a federal proceeding.

The brothers were arrested at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed officers of the murders; at 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant. At 7 p.m., having listened to portions of Daniel's statement, defendant himself confessed to Officer Fred Dreis. At midnight, the brothers were interviewed by Dr. Wait Griswold, a psychiatrist. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Johnny Bolden, a criminal investigator for the San Diego County District Attorney's office. Finally, at 1 p.m. on 7 July 1978--an hour before he was arraigned--defendant confessed to Officer Ronald Newman.[4/]

When one of defendant's sisters visited him in jail on 15 July 1978, he told her, "Now, I guess because I killed those two boys, they were only 16 years old, then robbed the bank and kidnaped them was because I really wanted to die." Defendant's last extrajudicial confession was made to a fellow inmate. Asked why he had killed the boys, defendant answered, "I couldn't have no punks running around that could do that [identify him], so I wasted them."

4/ The details of defendant's confessions will be given when we discuss his contention that the last of the four confessions, the one to Officer Newman, should have been suppressed on the ground his arraignment was unnecessarily delayed.

Testifying in his own behalf at the guilt phase, defendant admitted the bank robbery but denied kidnaping, robbing and murdering the two boys. He explained his pretrial confessions as attempts to protect his brother.

PENALTY PHASE

In 1975 defendant pleaded guilty to voluntary manslaughter of James Wheeler.

Wheeler and his wife lived with defendant's brother Ken and his wife; defendant and his wife lived next door. At the scene, defendant admitted beating Wheeler to death but claimed he had done so to protect the victim's wife when her husband threatened her with a knife. Later, just as in the present case, defendant repudiated his confession and sought to shift the blame to his brother, claiming Ken had killed Wheeler and that he had confessed to protect Ken. This is the story defendant told when testifying in the present proceeding. However, defendant's former wife and his niece testified defendant, without provocation, beat Wheeler to death while mockingly claiming to teach his victim self defense. During this sadistic attack defendant also cut off Wheeler's hair and threw matches at him after squirting him with lighter fluid. Defendant's former wife admitted she lied to the

grand jury investigating Wheeler's death explaining defendant had threatened to kill her too if she did not support his story.

Defendant continued to lead a life of violence while in jail awaiting trial on the present charges.

Defendant was housed in a "tank" consisting of a dayroom and adjoining cells. A guard approaching the tank overheard a conversation between defendant and other inmates in which reference was made to a knife. When the guard left to advise his superior a search should be conducted, one of the inmates, realizing a search was likely, told defendant to hide the "shank."[5/] Defendant went to his cell, removed from a box a piece of metal, which was approximately 10 inches long and sharpened on 1 edge. He then returned to the dayroom and concealed the shank underneath a table top where guards found it minutes later.

The next day defendant presided over a kangaroo court and found another inmate, Keith G., guilty of cowardice. Defendant told Keith he would have to submit to sodomy or lose his life. Keith was then taken into a cell, forced to

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5/ A "shank" is a knifelike implement fashioned by a prisoner from available materials.

lie face down on the bunk with his trousers pulled down and forcibly subjected to sodomy by three inmates, including defendant. Later in the day his assailants demanded Keith play strip poker with them. When Keith would not pick up his cards he was taken into the shower room and forced to orally copulate defendant and another inmate. Removed from the tank when he reported the assaults, Keith later encountered defendant in a holding area. Despite the presence of guards, defendant loudly and repeatedly threatened Keith's life.

Six days after the assaults upon Keith were reported, defendant's cell was searched. In the toilet a large water-soaked wad of tissue was found. Wrapped in the tissue was a 17-inch wire with looped ends in which the short pencils available to inmates might be inserted as handles. The guard who found this garrote said, "Look what I found, Bobby." Defendant, laughing, replied, "Aw, looks like you have me now."

Defendant's testimony during the penalty phase indicated he had a dismal childhood. When defendant was approximately 11 years old, his father served two separate prison terms for having sexual relations with defendant's sisters. The family then followed the harvest from state to state with defendant's mother and her boyfriend.

Defendant's schooling ended in the seventh grade. Defendant's mother forced him to leave the family when he was 14, saying he was not working hard enough. He soon stole a car and served four years in federal institutions for that crime, escape and a separate instance of attempted escape. He was subsequently imprisoned for the voluntary manslaughter of James Wheeler. Defendant was 26 years old at the time of trial.

Defendant admitted his testimony at the guilt phase--that he had nothing to do with killing the boys--was a lie. Changing his story, defendant testified he had not planned to kill the boys, that his brother had fired first, and "the next thing I knew I was shooting them myself."

Defendant claimed he was "sorry" about the murders. In support of this claim, defendant called Deputy Sheriff Michael Mendoza who testified that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared remorseful. However, defendant admitted on cross-examination he had told a jail visitor his attorney wanted him to express remorse and he was not going to do so.

DISCUSSION

None of the many contentions raised by defendant has merit. Indeed, none comes close to demonstrating prejudicial error. Nevertheless, because defendant's life is at stake, each will be fully discussed.

I

Defendant contends the trial court erred in denying his motion for change of venue based on prejudicial pretrial publicity.

A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. (People v. Welch (1972) 8 Cal.3d 106, 113; Frazier v. Superior Court (1971) 5 Cal.3d 287, 294; Maine v. Superior Court (1968) 68 Cal.2d 375, 383.) Whether raised on petition for writ of mandate or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable. (People v. Welch, supra; People v. Tidwell (1970) 3 Cal.3d 62, 68-69; Maine v. Superior Court, supra, 68 Cal.2d at p. 382.) The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status

of the defendant in the community, and the popularity and prominence of the victim. (People v. Salas (1972) 7 Cal.3d 812, 818.)

Of these factors, two weighed in favor of a change of venue in this case. Murder is, of course, a crime of the utmost gravity, and these murders were especially heinous. Press coverage of the crimes was extensive and included such information as that defendant was on parole for manslaughter, that his brother had confessed and had placed the blame principally on defendant, and that defendant himself had confessed. Two factors were neutral. Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication the victims or their families were "prominent." (Cf. Maine v. Superior Court, supra, 68 Cal.2d at p. 388; Frazier v. Superior Court, supra, 5 Cal.3d at p. 293.) Defendant lived in the same community as his victims and worked in San Diego. The final factor--the size of the community--tipped the balance against venue change.

The community in which this case was tried is quite unlike the communities involved in the cases upon which defendant relies. Of the fifty-eight California counties, San Diego County is third in population and

ninth in area. Moreover, the City of San Diego, where the trial took place, is the second largest city in this state. (State of Cal. Statistical Abstract (1979) pp. 1, 9, 12-15.) This is significant because the "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." (People v. Manson (1976) 61 Cal.App.3d 102, 189, and cases cited therein.) That the populous metropolitan character of the community dissipated the impact of pretrial publicity in this case was made clear on voir dire.

"A significant difference between pretrial and posttrial review is that after conviction in determining whether a defendant received a fair and impartial trial under the 'reasonable likelihood' standard, the review is retrospective. It extends to an examination of what actually occurred at trial." (People v. Martinez (1978) 82 Cal.App.3d 1, 13.) In other words, voir dire may demonstrate that pretrial publicity had no prejudicial effect. (See Murphy v. Florida (1975) 421 U.S. 794, 800-802; People v. Sommerhalder (1973) 9 Cal.3d 290, 303-304; People v. Manson, supra, 61 Cal.App.3d at pp. 187-188; People v. Whalen (1973) 33 Cal.App.3d 710, 716.)

Before discussing the voir dire in this case, it should be emphasized that the controlling cases

"cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (Murphy v. Florida, supra, 421 U.S. at p. 799.) "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Irvin v. Dowd (1961) 366 U.S. 717, 722-723.)

Examined under these guidelines, the voir dire clearly indicated pretrial publicity did not have the effect of denying defendant his right to a fair and

impartial jury. Four of the jurors chosen had not been exposed to any pretrial publicity. Of the remainder, none remembered anything in the least damaging to defendant, none knew anything about his background, and none had formed an opinion concerning his guilt or innocence.

II

We now consider defendant's contention that the trial court erred in denying his mistrial motions. The two motions arose out of separate but related incidents. The first incident involved a transcript given to the jury to assist them in understanding a tape recording of one of defendant's extrajudicial statements. Defendant moved for a mistrial on the ground the transcript contained a reference to his having called his parole officer. The second mistrial motion was based on the prosecutor's having elicited from defendant during cross-examination the admission he had been convicted of a felony and was on parole. Neither motion proves to have had merit.

A

As stated, because of acoustical problems members of the jury were furnished transcripts of defendant's extrajudicial statement to Officer Dreis. References to defendant's manslaughter conviction

were excised from the transcripts and the corresponding portions of the tape recording were not played for the jury. Well before trial, defense counsel was given a copy of the edited transcript. After reviewing it, counsel stated he had no objection. Despite these precautions, as the tape was being played for the jury, the prosecutor noticed in the transcript the reference to defendant's having called his parole officer. Commendably, the prosecutor immediately brought the problem to the court's attention. As a result the tape was stopped before the passage in question was played, the jury was asked to stop reading the transcripts, and a recess was ordered. During the recess the transcripts were left on the jurors' chairs and collected by the bailiff. Denying the mistrial motion with the observation he did not believe the jurors had read as far as the troublesome reference, the court offered to inquire whether the jurors had read that passage. This offer was declined by defendant, but with his approval the jury was carefully instructed they were to disregard anything they may have read in the transcripts if the corresponding portion of the tape recording had not been played for them.

First, defendant should not be permitted to raise this issue, having reviewed and approved the

transcript. Second, as the trial court pointed out, there is no reason to believe the jury read the statement in question. Third, if they did read the statement, we must assume they obeyed the instruction to disregard it. Finally, as will be explained below, inquiry by defense counsel following the guilt phase revealed the jury did not consider defendant's prior conviction during its deliberations.

B

Defendant's admission during cross-examination that he had previously been convicted of a felony and was on parole occurred under the following circumstances. Shortly after defendant was arrested, an evidence technician took nitric acid swabs of his hands to check for gunpowder residue. As the technician did so, defendant asked him whether the swabs would detect powder burns and pick up gunpowder particles. Upon being informed the test would reveal whether he had fired a gun recently, defendant stated he had been shooting in the Porterville area approximately 24 hours earlier. Defendant contradicted this statement at trial when he testified he had been in the San Diego area the day before the murders and had fired a gun near Miramar Lake. Defendant further testified he had not known of the murders, or of any shootings,

when the nitric acid swabs were taken, but was simply curious as to the purpose of the test.

The prosecutor pursued this line of inquiry further to demonstrate that in his conversation with the technician defendant manifested a consciousness of guilt--that defendant was concerned about the test because he knew he had gunpowder on his hands as a result of shooting the boys and that defendant lied to the technician about his activities the previous day to provide an alternative, innocent explanation for the powder traces. Defendant clearly realized he was being backed into a corner; rather than admit the truth, he blurted out that he was an ex-felon and on parole.[6/]

6/ "Q. Well, why would you be concerned about gunpowder being on your hand at that time, then?
"A. Just curious.
"Q. You didn't know there had been a killing of two boys up to that time, did you?
"A. No.
"Q. Didn't know anything about a gun prior to that, did you?
"A. No.
"Q. But you asked Mr. Stewart if this swabbing would take gunpowder off your hand, didn't you?
"A. Yes.
". . . . . .
"Q. Weren't you concerned that he would find evidence of your firing a gun that day when you killed the two boys?
"A. No.
"Q. It didn't bother you at all?
"A. Bother me? No, not then, no.
"Q. You weren't worried about there being evidence on your hands of firing a gun; right?
"A. Yes and no.

(Fn. 6 continued.)

This admission was obviously intended to provide a less damning explanation for defendant's concern that the swabbing would reveal that he had recently fired a gun, namely, that as a condition of his parole he was not to be in possession of a firearm.

Following defendant's admission there was a conference at the bench in which the prosecutor expressed surprise at defendant's answer and stated he would pursue the matter no further. Defendant's mistrial motion was denied on the ground that the prosecutor's questions were not intended to elicit the admission but that it had been volunteered by defendant. The jury was instructed that defendant's reference to being on parole for "some prior conduct" was not to be considered by them in determining his

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"Q. You were worried about it?
"A. Yes.
"Q. Why were you worried about it if there hadn't been any shooting?
"A. I'm not supposed to be around firearms or a pistol or even shoot a pistol.
"Q. Why aren't you supposed to be around a pistol?
"[Defense counsel:] Your Honor, I will object to the question.
"THE COURT: Overruled.
"[Defendant]: I was convicted of a felony.
"[Prosecutor]: And you were on parole?
"A. Yes.
"Q. So that is what you were worried about, is that what you are telling me now?
"A. Yes."

innocence or guilt of the crimes charged in this proceeding.

"Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide." (People v. Ing (1967) 65 Cal.2d 603, 611, and cases cited therein.) When a defendant voluntarily testifies in his own defense the People may "fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (People v. Schader (1969) 71 Cal.2d 761, 770.) Evidence relevant for these purposes is admissible even though it incidentally involves an unrelated offense. (People v. Crawford (1968) 259 Cal.App.2d 874, 880.)

Under these principles the prosecutor's cross-examination of defendant was entirely proper. Moreover, any error in this regard was cured by the instruction that the jury was not to consider defendant's admission in determining whether he committed the present offenses. That the jury followed this instruction was established by inquiry defense counsel was permitted to make of the jury following the guilt phase. At the hearing on

defendant's motion for new trial, defense counsel was asked by the court whether his inquiry of the jurors had shed any light on the issue. Counsel responded that none of the jurors he had interviewed was aware of defendant's prior conviction or had discussed the subject during deliberations. 7/

III

Defendant contends the trial court erred in denying his motion to suppress his confession to Officer Newman. Defendant had argued in support of the motion that his arraignment was unnecessarily delayed and that the challenged confession was obtained during the period of illegal detention. We need not resolve the question whether defendant was promptly arraigned. Even assuming arguendo he was not promptly arraigned, the delay would not necessarily have rendered his confession to Officer Newman inadmissible. "[D]elay in arraignment is but one factor to be considered in determining whether a confession is voluntary." (In re Walker (1974) 10 Cal.3d 764, 778-779; see People v. Kenárick (1961) 56 Cal.2d 71, 85; Rogers v. Superior Court (1955) 46 Cal.2d 3, 10-11.) It is not

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7/ The contention raised in a supplemental brief --that trial counsel violated his obligations to defendant by telling the court what the jurors told him--is as offensive as it is absurd.

contended, nor could it be, that defendant's confession to Officer Newman was involuntary.

Defendant was arraigned on the present charges 48 hours and 55 minutes after he was arrested for the bank robbery. The challenged confession was the last of four made by defendant during this period and occurred approximately an hour before he was arraigned. The parties stipulated to the following chronology. Defendant and his brother Daniel were arrested for the bank robbery and taken to the police station for interrogation concerning that crime at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed the officers of the murders; 10 minutes later the victims' bodies were found at the location described by Daniel. At 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant.

At 7 p.m., having listened to portions of Daniel's statement, defendant confessed to Officer Dreis. (It is not contended with regard to any of these confessions that defendant's rights under Miranda v. Arizona (1966) 384 U.S. 436 were violated.) Defendant told Officer Dreis: "Danny thought I was going to let them go. He didn't know I was going to kill them. Danny was about 20 feet away sitting down when I shot them. I shot one and he spun around. I then

shot him in the head because I didn't want him to suffer. I chased the other and shot the other boy about three times. Danny was scared and he didn't shoot either of them. I think I took the .22 and shot the blond kid one time. I was pretty loaded and didn't know what I was doing. I had smoked two joints before this came down. My brother was terrified. I didn't know what I was doing."

At midnight defendant and his brother were transported to the office of Dr. Wait Griswold, a psychiatrist, and interviewed by him concerning the murders. Defendant told Dr. Griswold he had shot the victims after assuring his brother they would not be hurt.

Defendant and his brother were booked into jail in the early morning hours of 6 July 1978. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Investigator Bolden. He told Bolden, among other things, that he and his brother planned to steal an automobile for use as a getaway car in the bank robbery; that he had approached the victims' car, pulled his pistol out of his waistband, entered the back seat of the car and ordered the boys to drive away; and that he shot John Mayeski in the chest and

head with the pistol, then chased Michael Baker and upon catching him, shot the boy three or four times with the pistol, and, finally, went back to Mayeski and shot him with the rifle.

The challenged confession was given to Officer Newman at 1 p.m. on 7 July 1978--an hour before defendant was arraigned. Defendant contends this confession was crucial to the People's case, despite its being the last of the four confessions. He argues its detailed character was used by the People to impeach defendant's testimony at trial that he had no part in kidnaping, robbing and murdering the two boys; that his brother was solely responsible for the crimes; that his confessions were attempts to cover up for his brother, and that he learned the details of the crimes from his brother while they were detained at the police station. Be that as it may, it is clear the delay in his arraignment did not affect the voluntariness of defendant's confession to Officer Newman. There is no reason to believe that confession was less voluntary than his previous confessions, the first of which was given 42 hours earlier, just 6 hours after his arrest.

IV

Defendant contends he was deprived of his

constitutional and statutory right to be present personally at all trial proceedings. (See Cal. Const., art. I, § 15; Pen. Code, §§ 977, 1043.) As the People's case-in-chief drew to a conclusion, a hearing was held in the absence of the jury as to the admissibility of the People's exhibits theretofore marked for identification. There was also a brief review of the question whether the jurors should have been polled by the court as to whether they had read defendant's reference to his parole status in the transcript of his interview with Officer Dreis. The record clearly indicates defendant was not present at this hearing; it also reveals, with equal clarity, his counsel did not object to his absence. Given the nature of the matters under discussion, defendant's presence was not necessary to protect his interests. Accordingly, the court did not err in holding the hearing in defendant's absence. (See People v. Jackson (1980) 28 Cal.3d 264, 309-311.)

V

Defendant contends the trial court erred in instructing the jury by failing to properly limit the purposes for which other-crimes evidence might be considered.

Tailoring CALJIC No. 2.50 (1977 revision) to the facts of this case, the court instructed the jury: "Evidence has been received tending to show that the defendant committed a crime other than that for which he is on trial. Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show one or more of the following: The identity of the person who committed the crime, if any, of which the defendant is accused; a motive for the commission of the crime charged; the existence of the intent which is a necessary element of the crime charged; that the defendant had knowledge of the nature of things found in his possession; that the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purposes."

Defendant express
tion was correct insofar as
that is, defendant concedes
quently robbed the bank usi
automobile as a getaway car
to show his motive in commi
ever, defendant contends th
insofar as it permitted evi
crime to be considered for
tioned.

Before discussing
we note there is no merit i
that defendant is precluded
by his failure to object to
Section 1259 provides in re
court may . . . review any
or modified, even though no
in the lower court, if the
defendant were affected the
see People v. Hannon (1977)

However, there is
argument that evidence of t
admissible on the questions
intent. That defendant lat

ly concedes the instruc-
it related to motive;
the evidence he subse-
ng the murder victims'
was admissible as tending
tting the murders. How-
e instruction was erroneous
dence of the uncharged
the other purposes men-

those other purposes,
n the People's argument
from raising this issue
the instruction below.
levant part: "The appellate
instruction given, refused
objection was made thereto
substantial rights of the
reby." (Italics added;
19 Cal.3d 588, 600.)
merit to the People's
he uncharged offense was
of identity, means and
er the same day robbed a

bank with the pistol used to murder the boys, driving as a getaway car the automobile stolen from the boys, certainly tended to show both that he had the means necessary to commit the murders and that he did in fact commit the murders. The evidence was also admissible on the question of intent, indicating as it did that the murders were committed in furtherance of the planned bank robbery.

The relevance of the bank robbery on the remaining issue--"that the defendant had knowledge of the nature of things found in his possession"--is unclear. However, despite the reference in the instruction to "a crime," evidence was introduced concerning another uncharged offense--the burglary of Jim Corbin's residence and the theft of his guns. These guns were the stolen property defendant was charged with receiving, and his participation in the theft of the guns clearly tended to show he knew they were stolen.

VI

Defendant contends the trial court erred in refusing to give requested instructions on diminished capacity resulting from voluntary intoxication.

The principles governing the duty of the trial court to instruct on diminished capacity were

reiterated recently in People v. Flannel (1979) 25 Cal.3d 668. "In substance when diminished capacity is at issue a trial court first evaluates the evidence. If defendant proffers evidence enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded that there was diminished capacity sufficient to negate the requisite criminal intent' [citation], the court must so instruct. A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect. [Citations.] In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.' [Citation.]" (25 Cal.3d at pp. 684-685.)

The trial court explained its refusal to instruct on diminished capacity as follows: "I think I indicated in our informal discussion that the Court in viewing this evidence was satisfied that we did not have a basis for diminished capacity instructions. [¶] First of all, we have no expert testimony in that regard. We have direct evidence on the part of the defendant

that even the marijuana that he had admittedly smoked did not in any way interfere with his knowledge of what he was doing. He did not claim any mental blackouts; he did not claim anything that would ordinarily go to the question of mental state in terms of diminished capacity, and I see no reason for giving those instructions."

Defendant contends substantial evidence of diminished capacity was elicited by the People from Officer Dreis when he testified that, in confessing to the murders, defendant told him: "I was pretty loaded and I didn't know what I was doing. I had smoked two joints before this came down. . . . I didn't know what I was doing."

Respondent points out, however, defendant repudiated that statement at trial. "Q Now, you weren't so under the influence of marijuana on [the day of the murders] that you didn't know what you were doing, were you? A No."

Moreover, defendant's statement to Officer Dreis, even if not repudiated, would not have constituted sufficiently substantial evidence of voluntary intoxication to warrant instructions on diminished capacity. The statement amounted to nothing more than a self-serving claim that, after smoking two

"joints" of marijuana, "I didn't know what I was doing." There was no indication how soon before the murders he smoked the marijuana. Nor, as the trial judge pointed out, was there any expert testimony on the effect that amount of marijuana would have on a person such as defendant.[8/] Contributing to our conclusion that the evidence of diminished capacity was insubstantial is the testimony of defendant's brother. Danny Harris testified defendant smoked one "joint" of marijuana approximately an hour before the murders and did not appear to be significantly intoxicated. Defendant's gait and speech were normal; he could understand what was said to him and could make himself understood. Finally, defendant's several detailed confessions belie his claim he did not know what he was doing.

In People v. Carr (1972) 8 Cal.3d 287, this court noted with approval: "It has been held that merely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on diminished

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8/ The importance of expert testimony for a claim of diminished capacity based on voluntary intoxication was recently emphasized in People v. Frierson (1979) 25 Cal.3d 142.

capacity." (8 Cal.3d at p. 294.) The Carr court went on to say: "Similar rules should apply to the consumption of marijuana." (Id., at p. 295.)

Bearing these rules in mind, we may profitably compare the evidence of marijuana intoxication in this case with cases in which this court has held evidence of alcohol intoxication to be too insubstantial to support instructions on diminished capacity. In People v. Flannel, supra, this court stated: "[W]e are of the opinion that defendant presented no substantial evidence of intoxication. First, defendant consumed relatively small amounts of alcohol over a long period of time. In the early morning, somewhere about 10 a.m., defendant drank about four tall cans of beer and a shot or two of gin. He then went shopping with his girl friend, and ate a sandwich for lunch. Between 2:30 and 4 that afternoon defendant drank a couple of beers and a shot of whiskey. In People v. Bandauer [1967] 66 Cal.2d 524, 528 [58 Cal.Rptr. 332, 426 P.2d 900], we found evidence of intoxication insufficient to require an instruction on diminished capacity if the defendant had 'six or seven beers during the six hours he was at various bars . . ., and he did not appear to be intoxicated.' Similarly, in People v. Spencer [(1963) 60 Cal.2d

64,] 88-89, we found evidence of intoxication 'minimal,' and therefore erroneous instructions immaterial, when defendant testified that he had had '"about three shots of whiskey" and some beer, and was "pretty well plastered."' Having observed defendant's behavior, the arresting police officers, however, testified that defendant was not under the influence of intoxicating liquor." (25 Cal.3d at p. 685.)

VII

Defendant contends the excusal of juror Susan McDevitt was error under Witherspoon v. Illinois (1968) 391 U.S. 510. Witherspoon holds that a prospective juror with scruples against the death penalty may not be excused for cause on that basis unless he makes it unmistakably clear he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial. (391 U.S. at p. 522, fn. 21.) That standard was clearly satisfied here.

The critical exchange occurred during voir dire by defense counsel.

"Q . . . are you saying that in no instance could you ever vote for the death penalty?

"A According to my own conscience? I would not use the death penalty, no.

"Q Are you saying you could never in any instance, if you are selected as a juror, vote for the death penalty?

"A No, never.

"Q If you were chosen as juror and the Court instructed you that it was your duty to consider both penalties, is it your testimony that you could not do so; that you would automatically and without regard to any evidence vote against the death penalty?

"A That's according to my own conscience.

"Q That is your belief?

"A Yes."

Defense counsel thereupon stated he had no further questions of Ms. McDevitt, the prosecutor challenged her for cause, and the court excused her. The exclusion was proper.

VIII

Defendant contends the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt and substantially increases the risk of conviction. This contention, voiced on appeal and amplified in a petition

for writ of habeas corpus which we earlier denied (In re Harris, Crim. 21341, denied by minute order on 22 October 1980), lacks merit. (Hovey v. Superior Court (1980) 28 Cal.3d 1.)

IX

We now consider defendant's contention that the trial court made a number of erroneous evidentiary rulings during the penalty phase.

A

Defendant contends the court erred by permitting the People to call defendant's wife in rebuttal without having given him notice as required by section 190.3.

Then, as now, section 190.3 provided in relevant part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to

the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." (Italics added.) The italicized exception is applicable here. No notice was required because the People called defendant's wife to rebut his testimony in mitigation.

B

Defendant contends psychiatrist Wait Griswold, testifying for the People in rebuttal during the penalty phase, usurped the function of the jury, "set[ting] himself up as a human lie detector concerning whether or not [defendant] felt remorse for his having killed the victims."

Defendant himself raised the question of remorse. As stated, having claimed during the guilt phase to have had nothing to do with the murders, defendant recanted that testimony during the penalty phase, expressly admitting the crimes and stating he was "sorry." He then sought to support his claim of remorse by calling Deputy Mendoza who testified

that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared to feel remorse for his crimes.

Dr. Griswold's testimony on direct examination was entirely unobjectionable. The psychiatrist testified he had examined defendant and was of the opinion he had an "antisocial personality"--a character disorder also known as "sociopathic" or "psychopathic" personality. Dr. Griswold stated sociopaths are commonly manipulative and, drawing upon his extensive experience as a prison psychiatrist, explained that in prison this manipulative tendency might be expressed by "ingratiating themselves with prison personnel [and] by . . . making what appear to be suicidal gestures in order to call attention to themselves or to manipulate themselves out of a difficulty."

Framing his question carefully, the prosecutor did not ask Dr. Griswold whether he believed defendant when he said he was remorseful. Rather, he asked, "if a person were truly a sociopath and had committed the crimes of the type that you discussed with [defendant], would you expect that

person to truly feel remorse for those crimes?" Dr. Griswold responded, "No, I would not." It was defense counsel who asked Dr. Griswold whether he credited defendant's claim of remorse. Asked on cross-examination, "So you venture no opinion whether or not he is remorseful at this time," the psychiatrist responded, "No opinion except that I would doubt it very much." The prosecutor carefully avoided encroaching upon the jury's province when he examined Dr. Griswold on direct. If defense counsel failed to exercise such care in cross-examining the psychiatrist, defendant may not now be heard to complain of the lapse.

C

Defendant contends the court erred in refusing to admit testimony of Clinton Duffy, former warden of San Quentin, and Howard Brodie, a CBS correspondent and courtroom artist, explaining how the death penalty is carried out. Evidence presented at the penalty phase should focus on "the character and record of the individual offender and the circumstances of the particular offense." (Woodson v. North Carolina (1976) 428 U.S. 280, 304.) The proffered testimony had no bearing on those issues and thus was properly excluded.

D

Concluding this line of argument, defendant contends the court erred in admitting evidence that while in jail awaiting trial for the present offenses defendant was found in possession of a wire garrote and prison-made knife. Defendant is precluded from raising this issue on appeal by his failure to preserve the point by appropriate objection in the trial court. (Evid. Code, § 353; People v. Rogers (1978) 21 Cal.3d 542, 547-548.) Moreover, the evidence was clearly admissible under section 190.3, which in relevant part provided then, as now: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction." (Italics added.) Possession of the garrote and the knife clearly involved an implied threat to use force or violence.

X

Defendant contends that instructing the jury pursuant to former CALJIC No. 8.89 was error

under former section 190.4, subdivision (b), and People v. Gainer (1977) 19 Cal.3d 835.

Former CALJIC No. 8.89 provided in pertinent part: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. After having considered all of the evidence in this case and having taken into account all the applicable factors upon which you have been instructed, you shall determine whether the penalty to be imposed on defendant shall be death or confinement in the state prison for life without the possibility of parole." (Supp. Service, pamp. No. 1 (1978).)

Former section 190.4, subdivision (b), provided in pertinent part: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Added by Stats. 1977, ch. 316, § 12, pp. 1260-1262, and repealed by § 9 of Initiative

Measure approved Gen. Elec. 7 Nov. 1978.)[9/]

Defendant argues that instructing the jury it "shall determine" whether the penalty is to be death or life imprisonment without possibility of parole creates the false impression that there is no third alternative, namely, deadlock.

People v. Gainer, supra, is inapposite. No "dynamite" instruction of the sort condemned in Gainer was given here. This jury was never deadlocked. It was not instructed that the case "must at some time be decided." (Cf. People v. Gainer, supra, 19 Cal.3d at pp. 841, 851-852.) Nor were minority jurors admonished to reconsider their opinions in light of the fact that the majority had taken the opposite position. (Id., at pp. 841, 847-851.) Moreover, CALJIC No. 17.40, the continued use of which was commended in Gainer, was given here.[10/] No error appears.

9/ Section 190.4, subdivision (b), now provides that a new jury is to be impaneled to try the penalty issue if the original jury is unable to reach a unanimous verdict. Upon a second failure to reach unanimity, the judge has discretion to impanel a third jury or to impose a life sentence without possibility of parole. (Added by § 10 of Initiative Measure approved Gen. Elec. 7 Nov. 1978.)

10/ CALJIC No. 17.40 provides: "Both the People and the defendant are entitled to the individual

(Fn. 10 continued.)

XI

Finally, defendant contends imposition of the death penalty under the 1977 statute would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Defendant admittedly does no more than ask us to reconsider the various arguments rejected in People v. Frierson (1979) 25 Cal.3d 142, 172-188 (opn. by Richardson, J.). We decline to do so. (See People v. Jackson, supra, ___Cal. 3d ___.)

None of defendant's contentions having merit, the judgment imposing the death penalty is affirmed.

CLARK, J.

WE CONCUR:

RICHARDSON, J.
NEWMAN, J.

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opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." (4th ed. 1979.)

C O P Y

PEOPLE v. HARRIS

Crim. 20888

CONCURRING OPINION BY TOBRINER, J

For the reasons set forth in the dissenting opinions of the Chief Justice and Justice Mosk in People v. Jackson (1980) 28 Cal.3d 264, I continue to believe that the death penalty statute under which defendant was convicted is unconstitutional. Until the majority opinion in Jackson is reversed by the United States Supreme Court or is overruled by a majority of this court, however, I consider myself bound by that decision's holding. Because I agree with the present majority's conclusion that under Murphy v. Florida (1975) 421 U.S. 794, the record in this case does not demonstrate that defendant was denied a fair trial, I concur in the judgment.

TOBRINER, J.

C O P Y

PEOPLE v. HARRIS

Crim. 20888

DISSENTING OPINION BY BIRD, C.J.

I respectfully dissent.

I.

These are terrible crimes of which appellant stands convicted, exceptionally cold-blooded and senseless. The reaction of San Diego County to their commission is understandable and, perhaps, even natural. The question before this court, however, is whether, amidst the clamor which attended that county's most notorious crime of the year, it is reasonably likely that appellant was not accorded a fair trial -- "the most fundamental of all freedoms"[1/] -- on the issues of guilt or of punishment.

Press coverage[2/] of appellant and his crimes began with his capture for bank robbery on July 5,

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1/ Estes v. Texas (1965) 381 U.S. 532, 540.

2/ This opinion uses the terms "press" and "publication" to refer not only to written journalism but also to the television and radio broadcast media.

1978. Two citizens observed appellant and his brother Daniel leave the bank after the robbery, and one of them followed the brothers as they drove back to their residence. This witness notified the police, and a combined "SWAT" and FBI team soon surrounded the house where appellant and Daniel were arrested. The police siege of the home was broadcast over local television, and the arrest of the robbers was the lead story in the San Diego Evening Tribune.[3/]

3/ With a circulation of 131,000 newspapers daily (except Sunday), the Evening Tribune is the second ranking newspaper in San Diego County. The San Diego Union has the largest circulation (200,000 daily; 300,000 Sunday). Other newspapers with substantial circulation in the county include the Los Angeles Times (41,000 daily; 52,000 Sunday), the Escondido Times-Advocate (31,000), the El Cajon Daily Californian (14,000), and the six Sentinel Newspapers (total local circulation 85,000). San Diego County has a population of about 1.7 million persons of whom 800,000 are registered voters. (Cal. Sect. of State, Rep. of Registration (Oct. 1978) p. 4.)

It is appropriate at this point to note some of the more obvious difficulties that arise when one attempts to determine the impact of publicity upon a jury pool by comparing a newspaper's circulation statistics with the gross population of the county. At the outset, it has been recognized that a newspaper's circulation statistics -- that is, the number of copies sold or given away -- significantly understates the number of persons actually reached by that paper. For example, a family would generally purchase only one copy of a newspaper to be shared among all family members.

On the other hand, since at least some individuals or businesses subscribe to more than one newspaper, one cannot obtain the number of newspaper subscribers simply by adding up the circulation statistics of each paper in the county.

(Fn. continued)

While initially the incident appeared to the press and, apparently, to law enforcement authorities to be "simply" a bank robbery, the situation quickly changed. Daniel told about the murders, laying the blame on appellant. The officers were shown the murder site by Daniel and the local television stations broadcast the recovery of the victims' bodies.

The story was front page news the following day (July 6th) in the San Diego Union (two front page stories), the Evening Tribune (four front page stories), and the Los Angeles Times (one story). The headlines described the crimes as "senseless murder" and observed that the community of Mira Mesa was "stunned." The Union mentioned that appellant was on parole from prison, that

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(Fn. 3 continued)

Finally, an assessment of the impact of adverse publicity upon a county's potential jury pool cannot accurately be obtained by comparing the number of persons reached by the publicity with the total population of the county. San Diego's gross population -- 1.7 million -- includes numerous persons who are statutorily ineligible to serve as jurors, for example, aliens and persons under the age of 18 years. A more realistic estimate of the jury pool's size might be registered voters. (See Code Civ. Proc., § 204e.) (There were 800,000 registered voters in San Diego County at the time appellant's jury was selected.)

Taking into account these various caveats, it seems reasonable to conclude that the several newspapers listed at the beginning of this footnote do have an extensive readership among persons constituting the jury pool of San Diego County.

at age 11 he had been arrested for cruelty to animals and burglary. Articles in the Evening Tribune related in both headline and text that appellant was on parole for a previous homicide and that his mother was herself on probation for bank robbery. An interview with appellant's parole officer was reported. In it, the officer revealed further details of appellant's manslaughter conviction and of his prior record for escape from a youth camp and for running away from home. Another official related that appellant had been on welfare at the time of the previous killing and "[i]t was hard to believe the filth" in his home.

That evening a local television station broadcast an interview it had conducted with appellant's father. In an emotional statement, the father told the reporter of a conversation he had had with appellant following his arrest in which appellant had admitted the killings. The story was picked up and disseminated by United Press International (UPI). (Shortly thereafter, appellant's father left the area.)

The stories by UPI for each of the following two days reported appellant's status as an ex-felon. Similarly, on July 6th, 7th, and 8th, the Associated Press (AP) coverage included references to appellant's prior record, including his juvenile record and his escape from the youth camp. AP also published its own interview with

appellant's parole officer and with the prosecutor in the prior manslaughter case. The prosecutor (now a judge) was quoted as stating that the prior homicide was a "stabbing death."

By July 7th, Daniel's confession to the police had been released to the press. It was reported that day in the Union, the Evening Tribune, the Times-Advocate, the Daily Californian, and the Vista Press, as well as by AP and three local television stations. The front page coverage in the Union included as headline "The Chilling Story of How 2 Boys Died." The text of the article reported the police account of Daniel's statements that appellant "thought up the whole thing" and that appellant shot one of the victims as he walked along carrying his hamburger. The Tribune's front page story was headlined "2 Boys Were Shot Without Warning." The text also noted the boys' bullet-riddled bodies and partially eaten hamburgers. A deputy coroner was reported as indicating that one of the boys had been shot without warning in the back.

The July 7th Union ran a separate story, headlined "Killings Suspect On Parole For '75 Slaying." Included in this article was an extensive interview with a member of the Imperial County Sheriff's Department. This officer detailed the facts surrounding appellant's prior

conviction and opined, "I knew he [appellant] was going to pull something. He beat that guy to death [in 1975] . . . beat him so hard on the head, he died of hemorrhaging."

The Union also published an editorial entitled, "Sorrow and Indignation," which stated: "We must bespeak the sense of grief and outrage that San Diegans share over the[se] mindless murders . . . . [¶] The circumstances of this tragedy are particularly appalling. . . . [¶] Because the horrible crime that snuffed out the lives of these young men could have happened to anyone, public sorrow and indignation are also tinged with fear." It further noted the "widespread belief that murderers may be paroled within a few years. This awful belief is well founded . . ." since the two victims' "murderer was not kept behind bars where he belonged." The editorial concluded: "If this crime, which could involve a confessed murderer paroled too early, can result in having punishment more nearly fit the crime in California, then [the victims] will not have died for nothing."

Further coverage in the Union, the Times, and the Daily Californian notified their readers that appellant's mother had been convicted for bank robbery. AP and UPI did the same. Appellant's prior manslaughter conviction was the subject of coverage by the Times-Advocate, the Vista Press, the Daily Californian, and AP.

On July 8th, the Union published another article concerning Daniel's confession and appellant's prior conviction. Headlines noted that the prosecution was seeking the death penalty for appellant. The article reported that there was considerable community outrage at the decision of the Community Release Board (C.R.B.) to parole appellant for the manslaughter conviction. A high ranking prison official was quoted as stating, "it's a reality that the Community Release Board made a mistake in this case . . . ."

That day's edition of the Evening Tribune carried similar reports about the prosecution's decision to seek the death penalty. Calling the offenses an "apparent willful execution of two innocent teen-agers," the chief deputy district attorney stated that "[t]he death penalty is designed to deal with this kind of offense." He also was quoted as stating that the evidence indicated that Daniel "did not personally participate" in the killings. The chief deputy further admitted that it might be difficult to empanel an impartial jury in the county after the published reports of Daniel's confession which laid the blame for the shootings on appellant.

The Times of July 8th contained the story of Daniel's confession, an interview with the judge who had been the prosecutor during appellant's prior manslaughter

proceedings, and an observation that the victims "appeared to have been shot down in cold blood." It again noted that appellant's mother had been convicted of bank robbery.

On Sunday, July 9th, the Union published a front page story and photograph of the funeral of one of the victims. The story quoted extensively from the minister who presided at the funeral and who described the perpetrators as "cruel, selfish, heartless people devoid of feeling and devoid of conscience." The article referred to appellant's status as a parolee for manslaughter, and it reiterated the prosecution's decision to seek the death penalty. The article then observed that no execution had been carried out in California in 11 years.

Later that same day, a television station conducted a one-question public opinion poll on its "Telepulse" show: "Do you agree with the death penalty demand in murder of two Mira Mesa youths?" Viewers phoned in their responses: 690 yes, 70 no.

On July 10th, both the Union and the Evening Tribune carried stories on the funeral of the second victim. The latter's article was on the front page. On July 11th, the Union published an article concerning the mother of one of the deceased boys and noted appellant was an "ex-convict on parole from a 1975 manslaughter conviction . . . ."

The Evening Tribune of July 12th carried a front page article under the headline, "Slain boy's mother finds words: It's senseless." The story stated that appellant was on parole for "a stabbing death." Accompanying the article was a large photograph of one of the deceased boys performing stunts on his bicycle. An article in the Times again referred to appellant's prior conviction and parole status. The Mira Mesa Sentinel carried one story about the victims' funerals and a second story and an editorial concerning the citizens who had aided in appellant's capture. The Sentinel reported that a sports scholarship had been set up by the local P.T.A. to honor the victims' memory and that another fund was collecting contributions for their families. It also related appellant's prior conviction, as did three local television stations. These stations also broadcast interviews with appellant's parole officer. Another newspaper editorialized: "With a past history of violent crime, and a murder conviction, to boot, what was Robert Harris doing on the streets?"

Two days later, the entirety of the Union's letters to the editor page was devoted to letters of outrage at the crimes and at the C.R.B.'s release of appellant. Appellant was called a "recidivist psychopath" and a "subhuman type." In the days which followed, other letters were printed demanding the death penalty for

appellant. The Union's editorial cartoon on July 17 showed pollution from a pipe labeled "Paroled Murderers" being poured into a stream labeled "Society."

In the next two days, the Union and the Tribune carried brief stories on the scholarship fund which had been created as a memorial to the two youths. And on July 19th, a television station broadcast an editorial, asking "whether this man, an ex-convict, should have been out of prison in the first place. Harris was paroled last January after serving less than two and a half years for beating to death a 19-year-old friend after a drinking spree. . . . Parole authorities rejected the warnings by an Imperial County sheriff's officer, familiar with the case, that Harris was a potential danger to society."

About this time, the publicity surrounding this case in San Diego County developed a new aspect, as the two major prosecutorial officers in the county became engaged in a sharp public dispute over which office would "get first crack" at prosecuting appellant. The local United States Attorney's office was responsible for the prosecution of the bank robbery offense, and the county district attorney for the homicides. Each office issued statements indicating what sentence appellant would likely obtain if convicted in its respective court. The United States Attorney claimed that the federal charges were an

"insurance policy" against appellant's early release by the parole board. After the district attorney's office responded that it was seeking the death penalty -- a punishment not available in the federal courts for bank robbery -- the United States Attorney held a televised news conference at which he expressed the opinion that the California death penalty law was unconstitutional.

The district attorney's office took the public position that if the federal charges were tried first, the state might lose the opportunity to try appellant and obtain a death sentence. The district attorney attempted to delay appellant's arraignment in federal court, and members of the office accused the United States Attorney of "political grandstanding." The United States Attorney responded that it was the county prosecutors who were "grandstanding."

When the federal authorities obtained a trial date of October 3, the Tribune noted this "tightens the race between the two jurisdictions as to which will be the first to try the case." An assistant district attorney described the "competition" between his office and the federal prosecutors as an "awkward situation." On August 7, the district attorney was able to have the state trial set on a date earlier than October 3, and the press reported that the district attorney had "moved ahead" in

his efforts to "beat federal authorities to the punch in prosecuting the Harris brothers."

Attorneys in the district attorney's office privately told the press that the motivation of the United States Attorney was "politics." They claimed "he is politically ambitious and . . . he knows the case will receive a lot of publicity . . . ." The United States Attorney responded that he was merely seeking "maximum protection of the community." Members of the district attorney's office were said to "scoff" at this justification.

On August 10, the Union published a lengthy article on the jurisdictional dispute, reporting that a senior federal parole officer "disputed" the United States Attorney's computation of appellant's federal sentence. This official, who calculated a prison term "far under" the term mentioned by the United States Attorney, "cannot understand why [the United States Attorney] is insisting on prosecuting the two brothers from Visalia." County prosecutors were again said to claim that federal involvement was "for the sake of publicity." An assistant legal counsel for the C.R.B. computed for the Union that "the least" appellant would serve in state prison would be a term of years well beyond the term calculated by the federal parole officer.

These events were duly reported by the Union, the Times, the Evening Tribune, and by the local television stations over a two and one-half week period from July 20th through August 10th, and beyond.

Coverage was not limited during this time period to the political dispute. Articles appearing in the Times of July 22d and 25th and August 8th and in the Union and the Tribune of July 22d and 25th and August 9th all reported further events in the case. On August 12th and 13th, the press reported that the confessions of both appellant and his brother had been introduced at their preliminary hearing. The Times story was headlined, "Harrises Bare Guilt to Them, Officers Testify." Portions of Daniel's confession were particularly publicized. According to police witnesses, appellant told Daniel that he wanted to kill everyone in the bank, and only after Daniel pleaded "there would be no more killings" did appellant relent. The Times carried Daniel's assertions that appellant had eaten the victims' hamburgers and had asked, "Wouldn't it be fun to pose as police officers and inform the next of kin that their son had been murdered?" Daniel was reported to be so fearful of appellant that he requested -- and was permitted -- to be kept in a jail cell separate from appellant.

Meanwhile, community reaction to the crimes was being expressed in other ways. The P.T.A.'s of seven schools combined to set up the memorial athletic scholarship in Mira Mesa. A local stereo store advertised that a portion of its income would be donated to that fund. Another memorial fund was set up to collect contributions to the boys' families. The bank which had been robbed gave rewards to three persons who had helped in the capture of appellant. It also took out large advertisements to laud the three, and the Tribune published an editorial commenting on these advertisements and again praising the three citizens. In its news broadcasts, a television station presented two of the citizens with its Good Citizen Award.

Numerous other details about the crimes, the court proceedings, appellant's background, and the victims were reported and reiterated in the press. Appellant and Daniel were consistently referred to as the "brothers from Visalia" (Tulare County). The two victims were described as popular teenagers and best friends. The father of one of the boys was a police officer who participated in appellant's arrest; a sister of one of the boys was inside the bank when Daniel and appellant robbed it. These facts and coincidences were widely disseminated by the press. Further coverage was given to statements by an officer in

Imperial County that he had unsuccessfully tried to prevent appellant's release on parole. A prison official was quoted as saying the C.R.B. had made a "mistake" by paroling appellant.

By mid-August members of the district attorney's office admitted to the press that this case received "the most news coverage of any this year in San Diego." Polls conducted that month by both the prosecution and defense more than substantiated this admission. Although differing considerably in their methodology, the pollsters for both sides found an extremely high public awareness of the crime. As one pollster stated, "this is the highest awareness factor in any of the polls that I have done regarding awareness of a particular alleged crime." Indeed, so well known was this case that by September 1st -- only five days prior to the hearing on the change of venue motion -- the Union published an editorial addressing the contemplated release from prison of two persons convicted of murder. The editorial was entitled "From Worry to Outrage" and stated: "San Diegans cannot forget the case of a paroled killer now charged with the vicious slaying of two teenagers, unfortunate enough to cross his path."

After the change of venue motion was denied, appellant filed a petition for a writ of mandate, seeking

to overturn that ruling. The petition was summarily denied by the Court of Appeal and by a four-to-three vote in this court.

Although diminished somewhat in frequency, the publicity given to this case by the press continued well past the change of venue motion. The extent and nature of the coverage between that motion and jury selection, can be gleaned by the fact that one prospective juror, who was called to try this case, indicated that he had been in Alaska during the entire summer and "didn't know a thing about [the case] until [he] returned in September," but he "read in the paper quite a bit about it since then." Although this juror recalled "not a great deal" of the details of the case, he had read enough to enable him to form the opinion that appellant was guilty. He was excused for cause.

Another indication of the extent of pretrial publicity comes from the voir dire in this case. Nearly 11 full court days were needed to obtain a jury of 12. Ninety-six prospective jurors were voir dired for those twelve positions. Of the 96, 90 percent had some prior information about the case, ranging from vague recollections to certainty of appellant's guilt. Twenty of the ninety-six were excused for cause due to the publicity, and appellant exhausted his twenty-six peremptory challenges.

Of those who had prior knowledge, most obtained their knowledge from publicity or discussions prior to coming to court, but four prospective jurors with no prior knowledge of the offense received information from other prospective jurors in the jury lounge. Indeed, of 13 jurors who were asked or volunteered information about what was occurring in the jury lounge, 11 indicated they had heard such discussions. One prospective juror told the court that "[m]any people expressed opinions with reference to guilt or innocence;" another indicated that in the jury lounge conversations she overheard, "their opinion had already been formed;" a third indicated he heard discussions "throughout the jury lounge."[4/]

Of the twelve jurors empanelled to decide the case, nine had some exposure to the pretrial publicity, and one juror, who had no prior exposure, heard jury room discussions. Among the twelve who served, one had seen the television interview with appellant's father, although this juror claimed to remember only that the father was "really broken up;" he did not mention that the father told the television reporter his son had admitted committing the killings. A second juror indicated that

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4/ At one stage in the voir dire proceedings, the trial judge called in the prospective jurors and admonished them to stop discussing the case in the jury lounge.

this case "was duly noted by I think everybody in our circle when the incident, you know, came to the news." This juror stated that "I imagine I did" express or form an opinion regarding appellant's guilt, but this was not a "definite judgment[]," and she indicated she had no opinion on guilt "at this time." The remaining jurors admitted to having less knowledge than these two.

II.

The right to a "fair trial in a fair tribunal" is a basic component of due process.[5/] So basic is this principle that it has been termed "the most fundamental of all freedoms."[6/] "It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. [Citations.]" (Nebraska Press Assn. v. Stuart (1976) 427 U.S. 539, 586 (conc. opn. of Brennan, J.).)

The Supreme Court has "insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'" (Sheppard v. Maxwell (1966) 384 U.S. 333, 350, citation omitted.)

5/ In re Murchison (1955) 349 U.S. 133, 136.

6/ Estes v. Texas, supra, 381 U.S. at page 540.

Thus, whenever there appears a "reasonable likelihood" that the dissemination of potentially prejudicial news prior to the trial will prevent a fair trial, the trial must be postponed until the threat abates or the case is transferred to another county not so permeated with publicity. (Id., at p. 363; Maine v. Superior Court (1968) 68 Cal.2d 375, 383-384; Fain v. Superior Court (1970) 2 Cal.3d 46, 54.)

The courts have identified several dangers to a fair trial which are relevant to the present case. Such a danger can exist if there is bias against the accused, as when the community harbors hostility toward the suspect and/or when pretrial publicity is inflammatory. Recognizing that the press both reflects[7/] and shapes[8/] the community's pattern of thought, courts have looked to the nature and extent of press coverage as a means of ascertaining bias or hostility toward an accused. Courts have also looked to other factors from which community bias might be inferred, such as the status of the accused in the community, the status of the victim, the nature of the offense, the size of the community, and whether the case becomes involved in local politics.

7/ See Irvin v. Dowd (1961) 366 U.S. 717, 725.

8/ See Irvin v. Dowd, supra, 366 U.S. at page 726; see also Clifton v. Superior Court (1970) 7 Cal.App.3d 245, 251.

A second and separate kind of danger to a fair trial may result if extensive pretrial publicity has tended to establish the accused's guilt. As the Court of Appeal has stated, "[a] reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility. [Citation.] When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (Corona v. Superior Court (1972) 24 Cal.App.3d 872, 877.)

In determining the likelihood of this form of prejudice, the courts look again at the extent and content of press coverage. Especially significant in this regard is whether there has been widespread publicity concerning confessions or admissions by the accused, accusations by an alleged crime partner, prior similar criminal conduct by the accused, or statements by presumably knowledgeable officials indicating their belief in the accused's guilt.

The record in the instant case contains virtually every factor which this court has heretofore considered relevant to the resolution of a change of venue question. The record is replete with indications of community bias. The press reported the "stunned" reaction of the community

to the murders and consistently mentioned the "outrage," "disgust," "indignation," and "fear" shared by San Diegans as a result.

Only a few days prior to the hearing on the change of venue motion, the county's largest newspaper wrote that "San Diegans cannot forget" these "vicious" killings. Appellant was described by members of the community as "cruel, selfish, heartless" and "devoid of feeling, and devoid of conscience." A police officer was widely quoted as stating appellant was dangerous, unstable, and violent. The press reported that even appellant's brother Daniel was afraid of him and that Daniel "was happy to be [in confinement] away from his older brother." Press coverage of even routine court appearances frequently mentioned that appellant was brought to court in chains. (Cf. People v. Duran (1976) 16 Cal.3d 282.)

Appellant was graphically portrayed in a cartoon as sewage polluting the community. In the letters to the editor, he was called a "subhuman type," a "recidivist psychopath," a "dreadful man," and a "beast." There were demands for his execution, and an announcement that citizens will "speak out and act if justice is not served . . . ."

Appellant's criminal history was a constant subject of public attention. The press frequently noted his arrest at age 11 for cruelty to animals. Other arrests and convictions for auto theft, runaway, escape from youth camp, burglary, and parole violation were brought out. His prior status as a welfare recipient and the "filth" of his house were deemed newsworthy. Even his mother's conviction for bank robbery was prominently featured. Most damaging, however, was appellant's prior manslaughter conviction, the details of which were repeated many times. The press carried interviews with a judge who had been the prosecutor for this offense, with police officers involved in its prosecution, and with his parole officer. Appellant was referred to by the leading newspaper as a "paroled killer."

The community was incensed that the C.R.B. had paroled appellant. This anger was expressed in editorials, in letters to the press, in comments by local law enforcement officials. The press recounted the efforts of a police officer in another county to prevent appellant's parole. Stories were carried attributing to prison officials the admission that it had been a "mistake" to release appellant. Editorials attacked the "feeble excuses" and "lame responses" of the C.R.B. for releasing appellant.

In prior decisions, this court has found the status of the accused and the victim to be significant. For example, in Fain v. Superior Court, supra, 2 Cal.3d at page 52 -- a case in which a change of venue was ordered -- the court noted that the defendant "had been a resident of the . . . area [where the crime took place] for only a few months prior to the crimes, and had not been integrated into the community." The same can be said of appellant; indeed, appellant and his brother Daniel were routinely referred to as "brothers from Visalia." Appellant's contacts with yet another county (Imperial) were amply emphasized in connection with the reportage of his prior manslaughter conviction there.9/

In Fain, this court also considered the fact that "the victims were popular local teenagers, whose fate drew expressions of public sympathy and aroused hostility towards the defendant[]." (2 Cal.3d at p. 51.) In the

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9/ The majority opinion asserts that appellant "lived in the same community as his victims and worked in San Diego." (Maj. opn., ante, at p. ____.*) This assertion does not accurately reflect the way appellant was portrayed by the press. Usually, he was said to be "from Visalia." According to one newspaper in Mira Mesa, appellant was a "transient renter." At the very least, appellant was no more integrated into the community than was the defendant in Fain, supra, whose minimal community ties were held to be a factor favoring a change of venue.

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* Typed opn., p. 12.

present case, too, the victims were also teenagers popular in their community, best friends on their way to go fishing when kidnaped; and one of them was the son of a police officer.10/ Public sympathy and tribute came in many forms. The Union noted the "hundreds of people -- strangers, mostly -- who rushed to [the] comfort" of the victims' families. Funeral arrangements were made for one family by a church of another faith.

A college scholarship fund was set up in memory of the boys by the P.T.A.'s of seven schools, and another fund collected donations for their families. The existence of these funds was publicized countywide. A local retail establishment advertised that it would donate portions of its income to the scholarship fund. Rewards were given to citizens responsible for appellant's capture. The bank took out advertisements lauding them, the county's largest newspaper praised them, and a major television station gave them its Good Citizen Award.

This court has also observed that the nature and gravity of the crime, as reported in the press, " may

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10/ Prior to the deaths of the boys, neither they nor their families were known outside the community of Mira Mesa. Their virtues were, however, made known to the county at large following their deaths, and the community's warm sympathy was displayed countywide. As the mother of one of the boys explained, "the whole of San Diego was just fabulous."

reasonably be taken into consideration in determining the risk of prejudice." (Fain v. Superior Court, supra, 2 Cal.3d at p. 54; see also Maine v. Superior Court, supra, 68 Cal.2d at p. 385.) Appellant's was a capital crime of utmost gravity. Moreover, the shocking nature of the case was thoroughly explored in the press. A deputy coroner told the press that one boy had been shot without warning in the back and that the other boy was flushed out of hiding and killed. At a press conference, the prosecutor termed the slayings an "apparent willful execution of two innocent teenagers." Gruesome details were frequently noted, from appellant's eating the victims' food to his desire to notify the boys' families of the slayings.

In addition, this case took on political overtones as the two major prosecutorial offices in the county engaged in public maneuvering in order to be first to bring appellant to justice. (Cf., People v. Tidwell (1970) 3 Cal.3d 62, 71; see also Maine v. Superior Court, supra, 68 Cal.2d at pp. 386-387.) Each side in the dispute seemed to boast about the severity of the sentence appellant would receive in its jurisdiction. Each accused the other of "grandstanding." The United States Attorney was said to be "playing politics." The press perceived the situation as a "race" between two antagonistic competitors.

Much of the publicity discussed thus far not only revealed community bias toward appellant but also assumed his guilt: the prior conviction for homicide (see People v. Fries (1979) 24 Cal.3d 222, 230); the reported details of the crime; and the expressions by the prosecutor and other local officials as to appellant's guilt. In addition, however, the press on numerous occasions carried the story of Daniel's statements, which laid the full blame for the murders on appellant. Appellant's own admission to the crimes was carried over television, via an emotional interview with appellant's father. This broadcast was seen by at least one of the jurors who decided appellant's guilt. His confession was disclosed when the preliminary hearing transcript was made public.

One relevant factor which this court has considered in the past but which is not present in the instant case is the small population of the community from which the jury is drawn. San Diego County is populous, in terms of both absolute numbers and voter registration. (Cf., ante, fn. 3.) However, "population size alone is not determinative." (Fain v. Superior Court, supra, 2 Cal.3d at p. 52, fn. 1; see also Smith v. Superior Court (1969) 276 Cal.App.2d 145, 150; Lansdown v. Superior Court (1970) 10 Cal.App.3d 604, 609-610.)

Contrary to Fain, Smith, and Lansdown, today's majority opinion appears to find that the size of the community is controlling. (Maj. opn., ante, at p.____.*) The majority blithely ignore the cases in which changes of venue have been ordered from populous counties, including one county which is considerably larger than San Diego. (See Smith v. Superior Court, supra, 276 Cal.App.2d 145 [L.A. County, population 7 million];[11/] Lansdown v. Superior Court, supra, 10 Cal.App.3d 604 [Kern County, population 300,000].) The fallacy of the majority's reasoning was fully set forth in Smith: "Carried to its logical conclusion, the [majority's] argument, if valid, would require that all motions for a change of venue in [a populous county] must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a notorious criminal case. This contention is disposed of by the court in Maine in the following language: 'We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely.'" (276 Cal.App.2d at p.

11/ Smith was cited with approval on this point in Fain v. Superior Court, supra, 2 Cal.3d at page 52, footnote 1.

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* Typed opinion at page 12.

150, quoting from Maine v. Superior Court, supra, 68 Cal.2d at p. 387, fn.13.)

The majority's apparent elevation of the population factor to preeminent status is all the more unfortunate in this case, because, unlike the Manson case[12/] upon which the majority partially rely, the pervading publicity surrounding the crimes was limited to two counties at most. Thus, alternative forums for appellant's trial were readily available.

The majority also assert that the pretrial publicity in this case did not prejudice appellant at trial. They seek to prove this proposition by reference to the voir dire examination of the 12 jurors empanelled to try this case. This effort to establish a lack of prejudice is unpersuasive.

As this court has long recognized, the fact that "it was possible to select [jurors] who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had." (People v. McKay (1951) 37 Cal.2d 792, 798, emphasis added.) Primary among the reasons for this rule are the difficulties inherent in identifying, uncovering, and preventing juror prejudice

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12/ People v. Manson (1976) 61 Cal.App.3d 102.

flowing from pretrial publicity.[13/] Thus, jurors' declarations of impartiality are not dispositive. (Sheppard v. Maxwell, supra, 384 U.S. at p. 351; People v. Tidwell, supra, 3 Cal.3d at p. 73.)

The United States Supreme Court recently articulated alternative tests for determining when due process requires a conviction to be set aside on appeal as the result of pretrial publicity. (Murphy v. Florida (1975) 421 U.S. 794.) Under these tests, the refusal to grant a motion for a change of venue will require reversal if, but only if, prejudice at trial is presumed, is inherent, or is inferrable.

Under the first test in Murphy, prejudice is "presumed" and a judgment of conviction must be reversed when "the influence of the news media . . . in the community at large . . . pervaded the proceedings."[14/]

13/ See, inter alia, Irvin v. Dowd, supra, 366 U.S. at pages 727-728; Sheppard v. Maxwell, supra, 384 U.S. at page 362; Murphy v. Florida (1975) 421 U.S. 794, 803; Nebraska Press Assn. v. Stuart, supra, 427 U.S. at pages 566-567; Maine v. Superior Court, supra, 68 Cal.2d at pages 380, 382-383; People v. Tidwell, supra, 3 Cal.3d at page 73; Lansdown v. Superior Court, supra, 10 Cal.App.3d at page 609; Corona v. Superior Court, supra, 24 Cal.App.3d at pages 878-879, 881.

14/ According to the complete quotation from Murphy, prejudice is presumed in cases where "the influence of the news media, either in the community at

(Id., at pp. 798-799.) Murphy cited Rideau v. Louisiana (1963) 373 U.S. 723 as a proper application of this "presumed prejudice" test. (See 421 U.S. at pp. 798-799.) In Rideau, the defendant had confessed under police interrogation to the murder of which he stood convicted. A twenty-minute film of his confession was broadcasted three times by one television station in the community where the crime and the trial took place. One of the broadcasts was viewed by an audience estimated to be about 50,000 persons in a commmunity of 150,000.

Believing that the televised film "in a very real sense was Rideau's trial" to those who viewed it, the Supreme Court reversed the conviction "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury. . . ." (Rideau v. Louisiana, supra, 373 U.S. at pp. 726, 727, initial emphasis in original, subsequent emphasis added.) The court held that "due process of law in this case required a trial before a jury drawn from a community of people who

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(Fn. 14 continued)

large or in the courtroom itself, pervaded the proceedings." (Emphasis added.) Since this language is framed in the alternative and since there is no claim in the present case of overbearing press influence "in the courtroom itself," that portion of the quotation is deleted. (Cf. Estes v. Texas, supra, 381 U.S. 532; Sheppard v. Maxwell, supra, 384 U.S. 333.)

had not seen and heard Rideau's televised 'interview.'" (Id., at p. 727.)

In situations where prejudice is not "presumed," the Murphy court held that a "totality of circumstances" test should be applied. (421 U.S. at p. 799.) Under this test, the appellate court determines whether either (1) "the jury-selection process . . . permits an inference of actual prejudice" or (2) "the setting of the trial was inherently prejudicial . . . ." (Id., at p. 803.) The court explained that even where no actual prejudice on the part of the trial jurors can be shown or inferred from the voir dire transcript, this factor "might be disregarded in a case where the general atmosphere in the community . . . is sufficiently inflammatory . . . ." (Id., at p. 802.)

The instant appeal undeniably involves one factor similar to that which invoked the "presumed prejudice" test in Rideau: a local television station broadcast a dramatic interview with appellant's father in which the father tearfully revealed appellant's confession to him. While this interview was not broadcast three times as in Rideau, and did not portray appellant himself, nevertheless this publicity must at least be considered to have substantial impact under the "totality of circumstances" test. This impact would be especially relevant to the empanelled juror who admitted to viewing the broadcast.

In my view, appellant has more than met the "totality of circumstances" test. An examination of the jury-selection process as a whole -- which Murphy requires, see 421 U.S. at page 803 -- discloses that 90 percent of the prospective jurors had been exposed to pretrial publicity or discussions about the case.[15/] Many jurors admitted they had felt horror or shock when the crime was disclosed in the press. And as one juror frankly admitted, it would take some "mind-rendering to erase maybe what I have felt." Indeed, one of the twelve jurors finally empanelled to try appellant's case stated "I imagine I did" form or express an opinion as to his guilt as a result of pretrial publicity. She stated, however, that she had no opinion "at this time" concerning guilt or innocence. She did not indicate what, if anything, had occurred to cause her to retreat from her initial opinion.

15/ This figure of 90 percent probably understates the actual proportion of such jurors. Courts have noted that jurors may not admit they have knowledge of pretrial publicity. (See, e.g., Corona v. Superior Court, supra, 24 Cal.App.3d at pp. 878-879.)

There is a strong indication that the jurors in this case were not immune from this tendency. According to a newspaper account of the preliminary voir dire of the first 12 jurors, when asked if they had read or heard about this case, "All 12 jurors raised their hands, some of them reluctantly and only after looking around to see the response of the others."

An especially disturbing aspect of the jury-selection process in this case was the report during voir dire of discussions by potential jurors in the jury lounge. According to the record, many people expressed the opinion that appellant was guilty. True, the trial judge did at one point call the jurors back into the courtroom specifically to admonish them against such conversations. However, such an admonishment is a double-edged sword. While it may deter future jury room discussions, the stern admonishment also reduces the likelihood that jurors, subject to voir dire thereafter, will admit to having heard or participated in these discussions.

In the final analysis, however, it is the inherently prejudicial setting of this case that tips the scales in favor of reversal. When the accused is portrayed as "sewage" polluting society, when the public is treated to the sorry spectacle of prosecutorial offices publicly vying with each other to have "first crack" at convicting the accused, when the accused's prior homicide conviction becomes a routine part of the continuing press coverage of the case, when the state prison system is assailed for its "mistake" in releasing the accused and a public official admits the same, when the prior record of the accused's mother is deemed to be newsworthy, when a

television station broadcasts the father's tearful recitation of his son's confession, then "the setting of the trial [is] inherently prejudicial." (See Murphy v. Florida, supra, 421 U.S. at p. 803.)

Under the totality of the circumstances, this case should be reversed so that a fair trial may be conducted.

III.

There are some particularly disturbing ramifications of the majority's holding in this case on the penalty phase decision of a capital trial.

The pretrial publicity in this case is important for another reason. The underlying but unmistakable message of the pretrial publicity as a whole was that the only appropriate punishment for appellant was death.[16/] This leads to an important point.

At the penalty phase of a capital trial, the jury has the especially delicate task of deciding whether the accused should live or die. Jurors are called upon to

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16/ The message comes through in this fashion: appellant has killed before, yet he was released from prison into society by blundering or incompetent prison officials; he has killed again, thus proving he will forever be dangerous and is no more than refuse in our community; the only way to prevent a second mistaken release and yet another tragic killing is to take the matter away from the control of the prison officials; this can be done only by executing the appellant.

"express the conscience of the community . . . ." (Witherspoon v. Illinois (1968) 391 U.S. 510, 519.) It is undeniable that jurors making the penalty decision are entitled to, and in fact must of necessity, exercise considerably more subjective discretion in performing this task than they do in reaching a decision on guilt or innocence. (See Adams v. Texas (1980) ____ U.S. ____, ____ [65 L.Ed. 2d 581, 590].)

The conscience of the community is expressed by assuring that the pool from which penalty phase jurors is drawn accurately reflects the community as a whole. In this way, the discretion exercised by those jurors will, in the long run, closely approximate that which would be exercised by the community as a whole. (Cf., generally, Hovey v. Superior Court (1980) 28 Cal.3d 1, 73-74.)

However, when a case produces a great deal of potentially prejudicial publicity, certain members of the community become ineligible to serve at the trial as a consequence of that publicity. They are removed from the pool of persons from which, inter alia, the penalty phase jury is drawn. Certain types of individuals tend to be removed from the pool as a result of pretrial publicity. It has been suggested that an "honest juror" will frequently find himself excluded. (See Corona v. Superior Court, supra, 24 Cal.App.3d at p. 879.) One might further

speculate that the "self-aware" juror may also tend to be excluded. But one type of juror will, almost by definition, tend to be removed in disproportionate numbers from the jury pool: the jurors who are informed and knowledgeable about current affairs.

Whatever the impact of the removal of these jurors upon the guilt determination, the impact on the penalty phase is likely to be devastating. At that phase, where jurors are given the most discretion and where the jury verdicts are supposed to express that undefinable quality known as the conscience of the community, the law removes from the jury those who are most informed about the community. Since extensive publicity tends to occur in connection with important cases, this removes these individuals in the very cases which are most significant.

There is no failsafe "solution" to this irony. However, a frank recognition of its existence would lead us to consider ways of mitigating its effect where possible. Such mitigation is readily available in capital cases like the present one, since intensive pretrial publicity was confined to a few counties in the state.

A change of venue to another county would have substantially restored the jury pool in this case to that which is available in a case of less notoriety. A change of venue would have made it possible for this court to

feel more secure that the verdict expressed in this case truly reflected the conscience of our California community.

IV.

Before the state can put to death one of its citizens, the accused must be found guilty after a fair trial by a jury selected from a cross-section of the community. In this case, appellant received neither. Under our case law, if a fair trial has been denied, the conviction must be reversed regardless of the evidence of the accused's guilt. (Irvin v. Dowd, supra, 366 U.S. at p. 722; People v. Tidwell, supra, 3 Cal.3d at p. 76; Maine v. Superior Court, supra, 68 Cal.2d at p. 384; People v. McKay, supra, 37 Cal.2d at pp. 798, 800.)

As this court explained more than a century ago, "The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitively failed. Cases sometimes occur, and this would appear to be one of them, in which the very enormity of the offense itself arouses the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had.

Under such circumstances the law requires that the place of trial be changed." (People v. Yoakum (1879) 53 Cal. 566, 571.)

BIRD, C.J.

I CONCUR:

MOSK, J.

82-6019

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-1095

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT ALTON HARRIS,

Cross-Petitioner,

v.

R. PULLEY, Warden of the California State Prison at San Quentin,

Cross-Respondent.

OPPOSITION TO THE CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the 1977 California death penalty legislation, under which petitioner was sentenced, violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment?

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No. 82-1095

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT ALTON HARRIS,	)
Cross-Petitioner,	)
v.	)
R. PULLEY, Warden of the California State Prison at San Quentin,	)
Cross-Respondent.	)

OPPOSITION TO THE CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Cross-respondent, R. Pulley, Warden of the California State Prison at San Quentin, respectfully requests that this Honorable Court deny the cross petition for writ of certiorari in which petitioner seeks review of that portion of the judgment of the United States Court of Appeals for the Ninth Circuit (entered on September 16, 1982) which ruled California's 1977 death penalty law to be valid on its face.

* * * * * *

OPINIONS BELOW

On February 11, 1981, the California Supreme Court affirmed the conviction and judgment of death in People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240.

After two unsuccessful petitions for writ of certiorari to this Court, three unsuccessful petitions for writs of habeas corpus in the California courts and one unsuccessful petition for writ of habeas corpus in the United States District Court for the Southern District of California, cross-petitioner's appeal was heard by the United States Court of Appeals for the Ninth Circuit which issued its opinion on September 16, 1982. (Harris v. Pulley 692 F.2d 1189 (9th Cir. 1982).) The Ninth Circuit found California's 1977 death penalty statute facially valid, but concluded that the California Supreme Court was obligated to provide a specific form of "proportionality review."

JURISDICTION

Cross-petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1254 (1) and rules 19.5 and 20.5 of the rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cross-petitioner relies on the Eighth and Fourteenth Amendments to the United States Constitution, set out at page two of his cross-petition. In addition, cross-respondent relies on a series of California Constitutional and statutory provisions set out at pages two through sixteen of appendix A to this opposition to the cross-petition.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted felon in

possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purposes of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979, the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first-degree, and found the special circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his petition being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas corpus in the United States District Court for the Southern District of California. Following a hearing held

March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16, 1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

Our petition for writ of certiorari was docketed in this Court on December 29, 1982, as number 82-1095.

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris 28 Cal.3d 935, 943-948; 171 Cal.Rptr. 629, 683-685.) They are also summarized briefly at pages 9 through 11 of our present, pending, petition for writ of certiorari.

SUMMARY OF ARGUMENT

The cross-petition for writ of certiorari in this case should be denied. California's 1977 capital punishment statute fully and properly meets the requirements set out by the opinions of this Court. The constitutionality of that statute has been upheld by the California Supreme Court, the United States District Court for the Southern District of

California, and the United States Court of Appeals for the Ninth Circuit. Furthermore, this Court has twice previously denied Harris' petitions for writs of certiorari on precisely the same grounds presented here. The only legitimate issue in this case is the question of the requirement, and scope of proportionality review. The question of the California statute's facial validity has been repeatedly and properly decided and needs no further litigation.

ARGUMENT

THE CALIFORNIA DEATH PENALTY STATUTES UNDER WHICH CROSS-PETITIONER WAS SENTENCED ARE CONSTITUTIONAL

For the third time in as many years cross-petitioner Robert Alton Harris asks this Court to rule that California's 1977 death penalty statutes are facially unconstitutional.

After the California Supreme Court affirmed Harris' conviction and judgment of death, he sought certiorari from this Court raising, inter alia, exactly the same issues presented in the current cross-petition. (Harris v. California No. 80-6702.) On October 5, 1981, this Court denied that petition. In 1982, following the denial of Harris' for petition for writ of habeas corpus by the California Supreme Court, he once again petitioned this Court urging the facial unconstitutionality of the California statute. (Harris v. California No. 81-6512.) On June 7, 1982, this Court denied that petition, too. Now, after having failed to persuade the United States Court of Appeals for the Ninth Circuit that California's statute is facial unconstitutional, he once again asks this Court to examine the issue and overturn the California statute.

After nine separate attempts before every available court in the nation, including two prior attempts with this Court, Harris has been unable to convince any court the California statute is unconstitutional. Only one court has found any fault whatsoever with the process by which California

intends to execute Harris. The United States Court of Appeals for the Ninth Circuit has ruled that a specific form of "proportionality review" is required prior to Harris' execution. This is the first time any court has made such a ruling. In our petition for writ of certiorari we have asked this Court to examine that question. It is a significant question in which the Ninth Circuit has taken a position at odds with the decisions of both the California Supreme Court and of this Court. Certiorari is necessary as to that issue.

However, as to the issue raised in Harris' cross-petition, certiorari is unnecessary. The question of the California statute's constitutional validity has been litigated exhaustively. Without exception, the courts that have examined it have ruled the statute to be constitutional. (See People v. Harris (1980) 28 Cal.3d 935, 171 Cal.Rptr. 679; People v. Jackson (1980) 28 Cal.3d 264, 158 Cal.Rptr. 603; People v. Frierson (1979) 25 Cal.3d 142, 158 Cal.Rptr. 281; Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189.) The reasons for ruling against Harris on the contentions he raises are set out fully and adequately in those cases, as well as in our previous arguments to this Court on those issues found at pages 18 through 30 of exhibit A to this opposition to the cross-petition.

We urge that in the interest of simplicity and judicial economy, this Court should conclude that the issues raised in the cross-petition have been fully, fairly, and finally decided. Thus, although we ask this Court to grant our petition on the issue of proportionality review, we urge this Court deny Harris' cross-petition on the facial validity of the California statute.

* * * * * *

CONCLUSION

For the foregoing reasons it is respectfully requested that the cross-petition for writ of certiorari be denied.

Respectfully submitted,

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of the State of California

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ROBERT ALTON HARRIS,
Cross-Petitioner,

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R. PULLEY,
Cross-Respondent,

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within OPP. TO CROSS-PETITION FOR WRIT OF CERTIORARI: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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JUDGE ELI H. LEVENSON

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San Diego, CA 92189
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JUDGE ENRIGHT

U.S. Court of Appeals
Ninth Circuit
7th and Mission Streets
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San Francisco, CA 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 25th day of February, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, February 25, 1983.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 25th day of February, 1983.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6702

ROBERT ALTON HARRIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the 1977 California death penalty legislation, under which petitioner was sentenced, violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment?

2. Whether denial of petitioner's change of venue motion, based on pretrial publicity, violated federal constitutional standards?

3. Whether penalty phase psychiatric testimony diagnosing petitioner as a sociopath and generally describing the characteristics of such persons denied petitioner due process and an impartial jury?

* * * * * *

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6702

ROBERT ALTON HARRIS,	)
Petitioner,	)
v.	)
STATE OF CALIFORNIA,	)
Respondent.	)

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INTRODUCTION

Respondent, State of California, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari in which petitioner seeks review of the judgment of the Supreme Court of the State of California entered on February 11, 1981, affirming the judgment of conviction and sentence of death.

* * * * * *

OPINIONS BELOW

On February 11, 1981, the California Supreme Court affirmed the conviction and judgment of death in People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240. Said opinion is attached as Exhibit A to the Petition for Writ of Certiorari.

On March 20, 1981, the California Supreme Court denied petitioner's Petition for Rehearing which denial is attached as Exhibit B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, U.S.C. § 1254 and Rule 17 of the Rules of the Supreme Court. (Petn., p. 2.) (Since petitioner is seeking Writ of Certiorari to a state court it would appear that the correct jurisdictional citation would be Title 28, U.S.C. § 1257(3).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon by petitioner are set out at pages 2 through 6 of the Petition. Respondent relies upon;

Article VI, section 11 of the Constitution of California:

> "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.
>
> "Superior courts have appellate jurisdiction in causes prescribed by

statute that arise in municipal and justice courts in their counties.

"The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right."

Former California Penal Code section 190:

"Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years."

Former California Penal Code section 190.1:

"A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

"(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged

that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

"(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

"(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4."

Former California Penal Code section 190.2:

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life

without possibilty of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

"(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim;

"(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

"(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

"(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subidvision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

"(2) The murder was willful, deliberate and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

"(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

"(i) Robbery, in violation of Section 211;

"(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substanitally increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

"(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

"(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14 years in violation of Section 288;

"(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

"(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture required proof of an intent to inflict extreme and prolonged pain.

"(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

"(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim."

Former California Penal Code section 190.3:

"If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128,

219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

"However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

"However, in no event shall evidence of prior criminal activity he admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

"Except for evidence in proof of the offense

or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

"In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(f) Whether or not the defendant acted

under extreme duress or under the substantial domination of another person.

"(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

"(h) The age of the defendant at the time of the crime.

"(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."

Former California Penal Code section 190.4:

"(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The

determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

"In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendantand by the people.

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true,

nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

"In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimouc verdict that all the special circumstances charged nare not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

"(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the derendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of

guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

"(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death peanlty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

"(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of

the prior phase is the same trier of fact at the subsequent phase.

"(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

"The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

"The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial."

Former California Penal Code section 190.5:

"(a) Nothwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of each person shall be upon the defendant.

"(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

"(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing

death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim."

California Penal Code section 1181, subdivision 7:

"When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed . . . ."

California Penal Code section 1239:

"(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

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STATEMENT OF THE CASE

The petitioner, Robert Alton Harris, was convicted after a jury trial of the offenses of kidnapping, robbery and first degree murder of John Mayeski and Michael Baker in violation of the California Penal Code sections 187, 189, 190, 209, subdivision (b), and 211. In addition petitioner was also convicted of receiving stolen property in violation of California Penal Code section 496, subdivision (1), and of possession of a concealable firearm by an ex-felon in violation of California Penal Code section 12021. Prior to the impanelment of the jury in this case, petitioner admitted this latter offense and an additional allegation that he had served a prior prison term for manslaughter, a "violent felony" within the meaning of California Penal Code section 667.5, subdivision (c). As to each of the kidnapping, robbery and murder counts alleged to have been perpetrated against each of the victims the jury found petitioner was armed with a firearm in violation of Penal Code section 12022, personally used a firearm within the meaning of Penal Code sections 1203.06 and 12022.5, and personally inflicted great bodily injury upon his victim in violation of California Penal Code section 12022.7.

The jury at the guilt phase of trial also found that special circumstances existed as to each of the homicides of which petitioner was convicted in that petitioner was convicted in this proceeding of more than one first degree murder (Cal. Pen. Code, § 190.2, subd. (c)(5)), and each of the murders was willful, deliberate, premeditated and committed during the commission of kidnapping and robbery (Cal. Pen. Code, § 190.2, subd. (c)(3)(i-ii)).

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At the penalty phase of the trial, the jury fixed the penalty at death. The sentence of death was thereafter imposed upon petitioner by the trial judge. Judgment and sentence were automatically appealed to the California Supreme Court and the judgment and sentence were affirmed.

The facts of petitioner's crimes, as well as those presented on the question of penalty are well summarized at pages 2 through 10 of the opinion of the California Supreme Court (attached as appendix A to the petition).

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this case should be denied. California's capital punishment legislation under which petitioner was sentenced complies with federal and constitutional standards as set forth in recent United States Supreme Court decisions. Further, petitioner's motion for a change of venue was properly denied under existing federal constitutional standards. Finally, psychiatric testimony offered on question of penalty narrowly and properly rebutted defense evidence and did not invade the province of the jury.

ARGUMENT

I

THE CALIFORNIA DEATH PENALTY STATUTES UNDER WHICH PETITIONER WAS SENTENCED ARE CONSTITUTIONAL

Petitioner argues that California's 1977 capital punishment legislation under which he stands condemned is in violation of federal constitutional standards as enunciated in recent opinions of this Court. We disagree. So also does the California Supreme Court which for the past decade has continually expressed its willingness to overrule California

death penalty statutes if constitutionally suspect. Three times the California Supreme Court has now upheld the constitutionality of the 1977 legislation petitioner attacks. (People v. Harris (1980) 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240; People v. Jackson (1980) 28 Cal.3d 264, 158 Cal.Rptr. 603, 618 P.2d 149; People v. Frierson (1979) 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587.) Furthermore, it should also be noted that this Court has previously denied certiorari in People v. Jackson, supra, when presented with substantially the same constitutional attack on precisely the same legislation.

Although the voters of California have changed California's capital punishment scheme in some respects in an initiative measure approved November 7, 1978, that measure is not applicable to this case and all references in this brief in opposition will be to the 1977 legislation under which petitioner Harris was tried and condemned.

A. Federal Constitutional Standards As Announced By This Court

On July 2, 1976, this Court rendered a series of decisions relative to the constitutionality of the death penalty. (Gregg v. Georgia (1976) 428 U.S. 153; Proffitt v. Florida (1976) 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262; Woodson v. North Carolina (1976) 428 U.S. 280; Roberts v. Louisiana (1976) 428 U.S. 325.) These cases upheld the constitutionality of the death penalty under federal grounds, but a plurality limited the procedures under which the death penalty could be given. Under the plurality decisions of these cases a constitutional death penalty statute would require the existence of (1) narrowly defined aggravating factors or categories of murder for

which capital punishment is authorized and (2) the opportunity for the defendant to present evidence and argument on and to have the jury consider mitigating circumstances with respect to both the commission of the offense and his personal characteristics which militate against imposition of the death penalty. (Gregg v. Georgia, supra, 428 U.S. at p. 199; Proffitt v. Florida, supra, 428 U.S. at pp. 252-256; Jurek v. Texas, supra, 428 U.S. at pp. 271-272.)

Thus, under federal standards capital punishment legislation must, ". . . focus on the particularized circumstances of the crime and defendant." (Gregg v. Georgia, supra, at p. 199.) A fundamental respect for humanity which underlies the eighth amendment, "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (Woodson v. North Carolina, supra, 428 U.S. at p. 304.) The death penalty statutes under which petitioner was tried and condemned comply amply with these federal constitutional standards.

B. California's 1977 Death Penalty Legislation

California's 1977 death penalty statute, related statutes, and related constitutional provisions are set out in full at the beginning of this brief in opposition. As previously indicated this statutory scheme has three times been upheld by the California Supreme Court and, in Jackson v. California, No. 80-6155, this Court has denied certiorari in the face of an almost identical attack on the same legislation.

The death penalty legislation in question leading up to a judgment of death is relatively straightforward

and, as a result, an encapsulized summary of its provisions seems unnecessary.

In addition, California Penal Code section 1239 provides for an automatic appeal in all capital cases. Article VI, section 11, of the California Constitution gives the California Supreme Court jurisdiction over cases in which the death penalty has been imposed. Both of these provisions are also set out in full in the beginning of this brief. It is apparent from these provisions that the death penalty statutes under which petitioner was sentenced and condemned were carefully drawn and based on the relevant recent decisions of this Court and are in full compliance with those decisions.

C. Petitioner's Specific Complaints

Petitioner's attack in his petition focuses on four specific complaints. First he urges that California's statutory scheme does not provide adequate guidance to the jury in imposing the death penalty. He also complains about the absence of requirement of a written statement by the jury of the basis for selecting the death penalty, as well as the absence of a specific burden of proof as to the factors underlying the death sentence. Finally he urges that the California scheme does not provide an adequate proportionality review of California death penalty cases. Although he does not argue that each of these is independently sufficient to render the entire statutory scheme unconstitutional, petitioner urges that his quartet of complaints, taken as a whole, must result in an invalidation of the law under which he was condemned. We shall examine his complaints in order.

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1. Objective Standards

As noted previously in this brief, this Court's recent decisions have indicated that constitutional death penalty statutes must feature narrowly defined aggravating factors or categories of murder for which capital punishment is authorized. In response to this requirement California Penal Code section 190.3 provided that in determining the penalty the trier of fact shall take into account any of a list of ten specified factors, to the extent they are relevant.

Petitioner complains that this is inadequate because the list of factors is not divided into specifically enumerated aggravating factors and specifically enumerated mitigating factors. This complaint is just plain silly. The majority of the factors listed in section 190.3 are presented in an alternative form such as section 190.3, subdivision (b), "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Obviously such activity is either present or is not present. One alternative is aggravating, the other one may be seen as mitigating. While it may not be clear to petitioner which is which, we suggest that most ordinary minds would readily conclude that the presence of such violent activity is aggravating while the absence of such violent activity could be mitigating. Looking beyond the fatuousness of petitioner's argument, it is clear that the decisions of this Court have not required separate listings of mitigating and aggravating circumstances. While this Court has approved state statutes which did in fact separate such factors, the actual language

of this Court's plurality opinion merely required, "The sentencing judge must focus on the individual circumstances of each homicide and each defendant." (Proffitt v. Florida, supra, 428 U.S. at p. 252.) Thus this Court's opinion has mandated a procedure which, "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose the sentence of death." (Jurek v. Texas, supra, 428 U.S. at p.274.) California's Penal Code section 190.3 clearly does this.

Petitioner further complains that the language in Penal Code section 190.3, which precedes the listing of factors, completely undermines the guidance apparently provided by giving the jury, "virtually limitless authorization to consider factors beyond those expressly enumerated." Petitioner's position reflects a misunderstanding of the statutory scheme.

Although we are unable to find language in that section exactly matching that quoted in the petition, petitioner apparently refers to the second sentence of the first paragraph of section 190.3 which provides,

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the

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defendant's character, background, history, mental condition and physical condition."

It is apparent that this language is not an invitation to the sentencing authority to consider the factors beyond those expressly enumerated later in section 190.3. Rather, this language addresses the question of what evidence will be admissible at the penalty phase which can form the basis for the jury's consideration of the enumerated factors. These provisions are obviously directly responsive to this Court's admonition that the sentencing authority, "must focus on the individual circumstance at each homicide and each defendant." (Proffitt v. Florida, supra, 428 U.S. at p. 252.) This language is also responsive to the court's preference against, "unnecessary restrictions on the evidence that can be offered at such a hearing . . . ." (Gregg v. Georgia, supra, 428 U.S. at p. 203.) In Gregg the plurality opinion specifically stated, "So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice defendant, it is preferable not to impose restrictions. We think it is desireable for the jury to have as much information before it as possible when it makes the sentencing decision." (Gregg v. Georgia, supra, at pp. 203-204.)

Thus it is apparent that section 190.3 provides precisely the objective standards required by this Court. The matters complained of by petitioner are either fully consistent with, or directly responsive to this Court's requirements.

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2. Written Statement of the Sentencing Authority

Petitioner next focuses on the fact that California's statutes do not require that the jury furnish a written statement of the basis upon which the death penalty was imposed, arguing that although this may not be sufficient in and of itself to invalidate the statutory scheme, it may be critical when considered in conjunction with other alleged deficiencies.

Initially, we note that we are unable to find any requirement in any of this Court's decisions that the sentencing authority provide such a written statement. Rather, in Gregg, Proffitt, and Jurek, this Court simply approved the statutory schemes which, in one form or another, made provisions of that nature. However, notwithstanding the fact that the jury itself is not required to provide such a written statement, California's statutory scheme does provide direct analogies to such a device.

California Penal Code section 190.4, subdivision (a), requires that a jury must make a specific finding relative to the truth or falsity of the special circumstance or circumstances which must be found true before a penalty phase may be held. Furthermore, in every case in which the jury imposes the death penalty, the defendant is deemed to have made an application for modification of the verdict under section 190.4, subdivision (e), and section 1181, subdivision (7), of the California Penal Code. In ruling on this application, the judge must state on the record the reason for his findings, and furthermore, should set forth the reasons for his ruling on the application and direct they be entered on the clerk's minutes.

Thus, although a written statement of the sentencing authority is not constitutionally required, California law did, at the time of petitioner's trial, require specific findings by the jury as to the special circumstances which authorize consideration of the death penalty and required that the judge state on the record the reasons for denying the mandatory application for modification of the death verdict. This is constitutionally sufficient.

3. Specific Burden of Proof

Petitioner next urges that the death penalty legislation under which he was condemned is unconstitutional because there is no requirement that the aggravating factors outweigh the mitigating factors, and further because there is no specific requirement that aggravating factors be found to exist beyond a reasonable doubt. Once again, this contention seems to be founded in a misconception of the total statutory scheme.

Before a death penalty sentence can be imposed, the trier of fact must first find the truth or falsity of the special circumstance or circumstances beyond a reasonable doubt. In the case of a reasonable doubt under section 190.4 of the Penal Code, the defendant is entitled to a finding that the special circumstance is not true. Therefore, the jury does have to find beyond a reasonable doubt that a special circumstance is true before the death penalty can even be considered. It is only after this true finding that a jury then begins to consider the aggravating and mitigating factors set forth in Penal Code section 190.3, at the penalty phase, thus, California's legislation is something like that which was upheld in Gregg v. Georgia, supra, 428 U.S. Under the Gregg legislation, there was

a narrowing of the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which had to be found by the jury to exist beyond a reasonable doubt before a death sentence could ever be imposed. Only after a finding of one of these circumstances by the jury could they then consider other listed mitigating or aggravating circumstances which might be supported by the evidence. (Gregg v. Georgia, supra, at pp. 196-197.)

In the same manner the 1977 California legislation limits the classes of murder by requiring that one or more special circumstances be found true beyond a reasonable doubt. Once this finding is made a penalty phase could be held during which the jurors would then consider the factors listed in Penal Code section 190.3. As was the case with the Georgia legislation no burden of proof is mentioned as to these additional aggravating and mitigating circumstances. Thus the California legislation in this respect mirrors that which was upheld in Gregg. (See also People v. Frierson, supra, 25 Cal.3d 142, 176, 158 Cal.Rptr. 81, 300-301, 599 P.2d 587, 606-607.)

Furthermore, this Court has not held that a burden of proof beyond a reasonable doubt must be imposed as to any circumstance for a death penalty statute to pass constitutional muster. In Proffitt v. Florida, supra, 428 U.S. 242, the jury was advisory to the trial court determining whether the mitigating circumstances outweighed the aggravating circumstances. However, no burden of proof was necessary in the Proffitt case. However, notwithstanding this, it should be remembered that California's 1977 legislation does in fact require proof beyond a reasonable doubt as to the special circumstances which allow the institution of

a death penalty phase. Thus, as in Gregg, once the sentencing body finds a special circumstance true beyond a reasonable doubt, then it may constitutionally consider other mitigating and aggravating factors. (See People v. Frierson, supra, 25 Cal.3d 142, 180, 158 Cal. Rptr. 281, 302-303, 599 P.2d 587, 608-609.)

4. Proportionality Review

Petitioner finally complains that the 1977 California legislation is unconstitutional for its failure to provide for proportionality review. To the contrary, we urge that the appellate guidelines for review in California are more than adequate.

As we have pointed out previously, all this Court's recent decisions require for a constitutionally sound death penalty statute is that the legislation have narrowly defined aggravating factors or categories of murder for which capital punishment is authorized and there would be an opportunity for the defendant to present evidence and argument and to have the jury consider the mitigating circumstances with respect to both the commission of the offense and his personal characteristics which militate against the death penalty.

This Court's decisions relied upon by petitioner did not require the kind of proportionality review he outlines. Rather, those decisions approved statutory schemes which, incidentally, contained review machinery quite similar to that provided in California. For example, in Jurek v. Texas, supra, 428 U.S. at p. 276, the appellate function is barely mentioned except for the fact that there is, "prompt judicial review of the jury's decision in a court with statewide jurisdiction." The fact that

appellate review in Texas is not delineated in any detail demonstrates that the constitutional requirement for this review is either minimal or nonexistent. Furthermore, in Proffitt v. Florida, supra, at pp. 251, 258-259, this Court noted that the Supreme Court of Florida, although there was no express requirement for proportionality review in any statutory form, had considered its function as including proportionality review.

In California, a criminal defendant in a death penalty case has an automatic appeal to the California Supreme Court. (Cal. Const. art. VI, § 11; Cal. Pen. Code, § 1239.) In much the same manner as the Florida Supreme Court, the California Supreme Court has unequivocally stated that it is prepared to afford whatever proportionality review that may be held constitutionally required. (See People v. Jackson, supra, 28 Cal.3d 264, 317, 318-319, 168 Cal.Rptr. 603, 631-632, 618 P.2d 149, 177-178; see also People v. Frierson, supra, 25 Cal.3d 142, 180-184, 158 Cal.Rptr. 281, 303-306, 599 P.2d 587, 610-612.) Certainly even a superficial examination of the California Supreme Court's decisions in death penalty cases over the last decade will eliminate any hypothetical concern that that court would allow imposition of the death penalty in a case where that penalty was so out of proportion to the crime involved that it even approached a violation of federal constitutional standards. Thus, the California statutory scheme provides for all the proportionality review contemplated by this Court's decisions.

After consideration of all these arguments it should be apparent that the capital punishment legislation under which petitioner was tried and condemned focuses

closely on the facts of petitioner's individual crime and additionally allows the sentencing body to consider mitigating circumstances with respect to both the commission of the offense and the personal characteristics of the defendant. Therefore, we submit that there was complete compliance with the standards set forth by the decision of this Court and that California's 1977 legislation is fully valid.

II

DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE BASED ON PRE-TRIAL PUBLICITY DID NOT DENY HIM HIS FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

Before trial in this case petitioner moved for a change of venue based on pre-trial publicity. After a lengthy hearing the motion was denied as was petitioner's pre-trial writ to the California Supreme Court. Once again on his direct appeal from the Supreme Court petitioner was unsuccessful in his assertions that holding his trial in San Diego County, the location of the crime, necessarily denied him a fair trial before an impartial jury.

Petitioner once again contends that denial of his change of venue motion rendered his trial constitutionally infirm. In support of his position he urges that the California Supreme Court (1) improperly weighed the relevant factors and (2) gave excessive credence to the statements of the jurors on voir dire as to their awareness of the pre-trial publicity.

In rejecting the petitioner's argument, the California Supreme Court noted that the factors to be considered are (1) the nature and gravity of the offense, (2) the nature and extent of the news coverage, (3) the

size of the community, (4) the status of the defendant in the community, and (5) the popularity and prominence of the victims. It is agreed that petitioner's crimes were especially grisly and heinous. It is further agreed that the pre-trial news coverage was extensive. It is for this reason that the California Supreme Court concluded that these two factors militated towards a change of venue.

Two other factors, the status of the defendant in the community, and the popularity and prominence of the victims were termed "neutral" by the California Supreme Court. This is the focus of the first aspect of petitioner's attack. The facts, as found by the California Supreme Court are,

> "Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication that the victims or their families were 'prominent.' [Citations omitted.] Defendant lived in the same community as his victims and worked in San Diego." (See Petn., Appen. A, p. 12.)

Petitioner urges that although the victims may have been virtually unknown prior to their murders they became known to the community at large following their deaths. This, of course, is true of any particularly disgusting homicide. Furthermore, petitioner argues that though he indeed lived and worked in San Diego, he was not well integrated into the community. Thus, petitioner concludes that because the murdered boys became known to the community after their murders, and because petitioner himself was not well integrated into the community, these two factors, "in fact weighed heavily in favor of a

change of venue." (Petn. at p. 9.) To call this stretching a point is an understatement.

Actually the California Supreme Court's characterization of these factors as neutral is very accurate. The murder victims were not unknown drifters passing through San Diego, nor were they prominent local personalities. They were just average American boys, growing up with their families in a quiet suburban neighborhood and thus fell somewhere in between the two ends of the spectrum. For this reason that factor was declared neutral. A similar analysis applies to the status of the defendant in the community. While he was hardly the local mayor or alderman, neither was he an outsider just passing through the community. He lived in the community where the victims were killed and he worked in San Diego. As such he too fell somewhere in the middle of the spectrum and this factor too was neutral.

Ignored by petitioner is the remaining factor which the California Supreme Court held to have "tipped the balance -- the size of the community of San Diego." As the California Supreme Court noted, San Diego County is the third most populous county in the state. (See Appen. A to Petn., p. 12.) At the pre-trial motion on this matter the trial court took judicial notice of the fact that San Diego's population was 1,677,800 and that the county is sprawled across 4261 square miles of land. (RT [9/7/78] 178.) It was further emphasized in the pre-trial hearings that San Diego County is quite diverse, with massive metropolitan areas, beach towns, large agricultural centers, and mountain hamlets. (CT 169.) As the California Supreme Court noted, the cases have specifically emphasized that the adversities

of pre-trial publicity are considered offset when a trial is conducted in a populous metropolitan area. (See Appen. A to Petn., p. 13.)

The fact that the large size of the community had dissipated the impact of any pre-trial publicity was made clear during voir doir of the prospective jurors. One of the advantages to a post-trial examination of such an issue is the ability to examine the voir dire of the jurors actually impaneled to determine the impact of the pre-trial publicity. This Court has noted that the voir dire may demonstrate that the publicity had no prejudicial effect. (Murphy v. Florida (1975) 421 U.S. 794, 800-802.) As the California Supreme Court noted,

> "Four of the jurors chosen had not been exposed to any pre-trial publicity. Of the remainder, none remembered anything in the least damaging to the defendant, none knew anything about his background, and none had formed an opinion concerning his guilt or innocence." (See Appen. A to Petn., 15.)

However, petitioner urges that we ought not give too much credence to the juror's sworn statements in this regard since few jurors (petitioner urges) would be likely to admit their inability to be fair when questioned in front of their fellows. (Petn., at p. 9.)

Whatever validity this concern may have in the ordinary case, it is completely defused by the voir dire procedures employed in this case. In a procedure that was unique in this case, but has since become the standard for California death penalty cases the prospective jurors were voir dired individually out of the presence of other

jurors. The express intention of this procedure was to provide the fullest possible encouragement to complete disclosure by the prospective jurors. The existence of this procedure evidences the awareness and concern on the part of the trial court for the very matters petitioner now urges. The trial judge's comments at the close of voir dire are particularly pertinent to this point.

> ". . . I was impressed with the forthrightness of the jurors. I think the fact that they were interviewed individually and questioned individually even increases the desire on the part of the juror to tell us precisely what their feelings were, not only with regard to the matters that were the subject of the examination, but the knowledge that they have required through the media or the listening to broadcasts and so on. I was impressed by the frankness of many of them who indicated even in one or two instances direct knowledge by reason of their having lived in the immediate vicinity and so on. I cannot say that the twelve jurors who had been chosen have no knowledge or have read nothing, because, of course, would indicate a jury of persons who did not have the type of mind that I think counsel would want to evaluate the testimony. I saw nothing, however, in the examination to indicate to me that the jury or in any sense there was a feeling of hostility, that there was antagonism, or that there was a knowledge so great as to

create an atmosphere that would not allow for a fair trial. As a matter of fact, I think the reverse is true. I am satisfied that the jury that has been selected was very fairly selected. I would compliment both counsel in the manner in which they conducted that examination, and I would say it was most extensive. And I, too, feel this record would stand up in any court in terms of obtaining a jury that would give a fair trial." (RT 2421-2422.)

Finally, petitioner urges that whatever the impact of the pre-trial publicity may have been on the guilt phase, it must have been particularly detrimental to the subtle and spiritual quality brought to the jury's determination as to penalty. Of course, all of the above comments relative to this issue in general apply here. However, a broader view of the evidence developed in this case seems particularly useful in assessing this last point.

By the time the jury retired to decide the issue of penalty they had a complete picture of petitioner. As outlined by the California Supreme Court's recounting of the facts, petitioner was pictured as a man who had killed three people, two of them innocent teenage boys. He had taken special relish in firing an unnecessary bullet into the head of one of the boys just to see what it would be like. He had eaten the dead boys' hamburgers and laughed at his brother's inability to do so. He had laughingly flicked bits of flesh from the muzzle of his gun recounting how he had blown the one boy's brains out, and then

lightheartedly relished the fantasy of dressing as a policeman and telling the boy's family of his death. He confessed six times prior to trial and then took the stand during trial to deny the crime and place the blame on his younger brother. Evidence of the penalty phase demonstrated that after his first killing he had followed the same pattern of initial confession followed by denial with a placement of the blame on another brother. The jury had heard that even after being placed in pre-trial confinement petitioner had continued to brag with relish about his murders, and had continued to prey on his fellows. He was twice caught making deadly weapons in jail. These few matters are but the highlights of the picture of appellant as the jury saw him. It has been and can still be reasonably asserted that if there was ever an argument for capital punishment it is Robert Alton Harris. The guilt and penalty phases of his trial were massively and appropriately prejudicial to him. Compared to that evidence any possible awareness the jurors might have had of his case before the trial pales into the most gossamer insignificance. Beyond any reasonable doubt petitioner was condemned to death because of his deeds and his character, not because some jurors may have been aware of the crime before the trial.

III

PSYCHIATRIC TESTIMONY RELEVANT TO PETITIONER'S REMORSE FOR THE CRIME DID NOT DENY HIM DUE PROCESS OF THE LAW

At the penalty phase of his trial petitioner found himself in something of an awkward position. He had confessed, sometimes in excruciating detail, six times prior to trial. Then he had taken the stand during trial,

denied guilt, and blamed his younger brother for the murders. The jury had obviously not believed him, and had obviously believed many other terribly unpleasant things about him. Furthermore, before petitioner got to the stand at the penalty phase that same jury had heard testimony that the last time petitioner killed someone he had also initially admitted it, then denied it and blamed it on a brother. From a strategic point of view it is clear that petitioner's maneuvering room had been largely circumscribed by the time it came for him to testify at the penalty phase. He had but one card left to play and he played it. He admitted guilt, making his seventh confession, this time on the witness stand, apologized, and claimed to be remorseful. He said he did not want to die. (RT 4386-4387.) Petitioner also put on evidence from a deputy sheriff who had been assigned to the jail while petitioner awaited trial. That deputy testified about an attempt by petitioner to slash his wrists in county jail and another attempt to stab himself in the stomach with a golf pencil. (RT 4580-4583.) That deputy testified that petitioner appeared remorseful.

To rebut this evidence of "remorse" the prosecution called Dr. Wait Griswold, a psychiatrist, who saw petitioner shortly after his arrest. After Mirandizing petitioner, Dr. Griswold had interviewed him and given him a battery of psychological tests. Based on this work-up Dr. Griswold diagnosed petitioner as an anti-social personality, also referred to as a sociopathic personality. Dr. Griswold testified that such persons seldom have any remorse for their crimes and are commonly manipulative in attempting to mitigate the consequences of their behavior. Such manipulativeness, the doctor testified, often includes

the staging of suicidal gestures in an attempt to call attention to themselves. (RT 4652-4655.)

Dr. Griswold made reference to the "suicide attempt" by petitioner in county jail noting that it is consistent with such gestures and with petitioner's personality disorder. The doctor noted that petitioner cut his arm in a place (mid forearm) where most laymen would know little serious damage would occur. Further, the doctor noted that the fact petitioner immediately sounded the tank alarm after cutting himself was particularly consistent with the attempt being a mere gesture. (RT 4653-4655.) Dr. Griswold's observations were further bolstered by testimony of the county jail deputies who had responded to the tank alarm and said that the pool of blood that they discovered, although large, appeared to have been diluted with water. (RT 4694-4695.)

Dr. Griswold did not testify that petitioner was not remorseful. He testified petitioner was a sociopath, that such persons are not usually remorseful, and that the circumstances underlying petitioner's ostensible remorse were entirely consistent with the manipulativeness most commonly found in such sociopaths.

Petitioner claims that the implied message in the doctor's testimony was that petitioner was lying about remorse and therefore deserves to die. (Petn. at p. 12.) Although petitioner cites no authority for the proposition, and offers scant reasoning, his apparent theory is that the jury was so overwhelmed by Dr. Griswold's unstated implication that it totally surrendered its decisional role to the doctor and adopted, without question, his

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allegedly implied conclusion. We would submit that this is all too tenuous and not sufficiently realistic.

As the California Supreme Court noted, "The prosecutor carefully avoided encroaching upon the jury's province when he examined Dr. Griswold on direct." (See Petn., Appen. A, at p. 38.) It must be remembered that it was petitioner who raised the issue of remorse. Thus the doctor's testimony was rebuttal which did no more than diagnose petitioner's personality disorder and demonstrate how his behavior is consistent with that, carefully stopping short of addressing the final factual question.

In his brief to the California Supreme Court petitioner argued that the doctor had, "set himself up as a human lie detector." To the extent this is the gravamen of petitioner's complaint the fact that Dr. Griswold never testified that petitioner was lying is one simple complete and direct answer. Furthermore, by the time Dr. Griswold testified there was no question left but that petitioner was an unredeemable liar. In fact, perhaps the most potent testimony on the issue of petitioner's credibility came from petitioner himself when he was asked about the lies he told during the guilt phase. On cross-examination by the prosecutor the following colloquy occurred.

"Q Now, it is clear you lied to the jury when you testified in the guilt phase.

"A Yes, I did.

"Q Was that decision yours?

"A Yes.

"Q Did anybody else know that you were going to lie?

"A No.

"Q And why did you lie to the jury then?

"A Well, there's two explanations; one is that I have nothing to lose, the other one is that it's easier to tell -- it's easier to tell a lie than to tell the truth. (RT 4448.)

In context, it seems absurd to argue that if the jury was suspicious of petitioner's credibility it was on the basis of some vague implication from Dr. Griswold rather than from petitioner's direct testimony and the weeks of evidence which had passed before.

Petitioner cites Smith v. Estelle 602 F.2d 694 (5th Cir. 1979), cert. granted, 445 U.S. 926. That case is currently before this Court and may raise the issue of the propriety of psychiatric testimony to establish future dangerousness as that issue must be determined prior to the imposition of the death penalty under Texas law. Obviously that issue is nothing like the one presented here. Dr. Griswold made no predictions whatsoever as to what petitioner's conduct would be like in the future, limiting his testimony rather to the nature of petitioner's personality disorder. In this regard it should be noted that the Court of Appeal in Smith v. Estelle, while exhibiting grave doubts as to the usefulness of psychiatric testimony to predict future conduct, seemed to conclude that psychiatric testimony might well be valid to catagorize individuals into specific groups which, as a whole, exhibit certain kinds of behavior. (Smith v. Estelle, supra, 602 F.2d at 700, fn. 7.) That, of course, is all that happened here. Certainly Dr. Griwold's testimony did not infringe upon petitioner's federal constitutional rights.

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CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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